(1)

91-1869

No. _____

Supreme Court, U.S.
FILED
MAY 20 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

PRODUCTION PLATED PLASTICS, INC., MICHIGAN CITY PLASTICS CO., INC., AND MICHAEL J. LADNEY,

Petitioners,

v.

UNITED STATES OF AMERICA, Frank J. Kelley, Attorney General for the State of Michigan, ex rel.; Michigan Department of Natural Resources Commission; Gordon E. Guyer, Director of the Michigan Department of Natural Resources,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

DOUGLAS W. VAN ESSEN (P33169)
Attorney for Petitioners

Business Address & Telephone:
Suite 500, 200 Ottawa Ave., NW
Grand Rapids, Michigan 49503
(616) 459-1171

(Additional Counsel Listed On Inside Cover)

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

92

ELLIOT EDER
MICHAEL SHIPARSKI
STUART HERSCH
Attorneys for Respondent-
United States of America

Business Address & Telephone:
P.O. Box 7611, Ben Franklin Station
Washington, D.C. 20044
(202) 514-1307

STEVEN E. CHESTER
Assistant Attorney General
Attorney for Respondent-
State of Michigan

Business Address & Telephone:
Environmental Protection Division
P.O. Box 30212
Lansing, MI 48909
(517) 373-7780

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Under Sup.Ct.R. 14.1(a), Petitioner submits the following issues for review:

1. Did Congress intend that individual corporate officers be jointly and severally liable for corporate violations of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901, *et seq.*?

2. Assuming for the sake of argument that Congress intended that individual corporate officers can be jointly and severally liable for corporate RCRA violations, is such liability dependent upon personal participation in the corporate decisions which produced the RCRA violation?

LIST OF PARTIES

Pursuant to Sup.Ct.R. 14.1(b), the following are parties in this action:

Plaintiffs: United States of America; Frank J. Kelley, Attorney General for the State of Michigan, ex rel; Michigan Department of Natural Resources Commission; Gordon E. Guyer, Director of the Michigan Department of Natural Resources

Defendants: Production Plated Plastics, Incorporated; Michigan City Plastics, Incorporated; Michael Ladney; Marguerite Ladney

Third-Party Defendants: Amerace Corporation

TABLE OF CONTENTS

Page

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES ii

TABLE OF AUTHORITIES iv

JURISDICTION AND OPINIONS BELOW 2

STATEMENT OF CASE (FACTS) 3

STATUTORY PROVISIONS INVOLVED 8

ARGUMENT/INTRODUCTION 9

I. RCRA AND ITS REGULATIONS ARE NOT INTENDED TO IMPOSE JOINT AND SEVERAL LIABILITY ON CORPORATE OFFICERS 11

II. THE TRIAL COURT CLEARLY DID NOT REVIEW THE EVIDENCE IN A LIGHT MOST FAVORABLE TO MR. LADNEY WHEN IT CONCLUDED THAT LIKE PPP, MR. LADNEY WAS THE PERSON RESPONSIBLE FOR THE OVERALL OPERATION OF THE PPP LAGOONS.... 23

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES:

Anderson v. Butz, 550 F.2d 459 (9th Cir. 1977)..... 14

Berger v. Columbia Broadcasting System, Inc., 453 F.2d 991 (5th Cir. 1972)..... 9

Caminetti v. United States, 242 U.S. 470 (1917) 13

Edmonds v. Campagnie Generale Transatlantique, 443 U.S. 286 (1979)..... 18

In the matter of Southern Timber Products, Inc., RCRA (3008) Appeal No. 89-2 ..... 16, 17, 20

Joslyn v. T.L. James & Co., 696 F.Supp. 222 (W.D. La. 1988) aff'd 893 F.2d 80 (5th Cir. 1990) 10, 12, 18

Kelley v. Arco Industries, 723 F.Supp. 1214 (W.D. Mich. 1989)..... 11, 21, 22, 28

Midlantic National Bank v. New Jersey, 474 U.S. 494 (1986)..... 17

Moline Properties v. Commissioner, 319 U.S. 436 (1943)..... 9

New York v. Shore Realty, 759 F.2d 1032 (2nd Cir. 1985)..... 12

Schick v. Steiger, 583 F.Supp. 841 (E.D. Mich. 1984) 25

United States v. Environmental Waste Control, Inc., 710 F.Supp. 1172 .....15, 28

United States v. Northeastern Pharmaceutical (NEPACCO) Co., 840 F.2d 726 (8th Cir. 1986).....11, 28

United States v. Production Plated Plastics, Inc., 742 F.Supp. 956 (W.D. 1990); 762 F.Supp. 722 (W.D. Mich. 1991)..... *passim*

United States v. Ron Pair Enterprises, Inc., 489 U.S. 235 (1989)..... 13

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

5 U.S.C. § 552(a)(1) 14

28 U.S.C. § 1331 2

28 U.S.C. § 1345 2

28 U.S.C. § 1355 2

28 U.S.C. § 2101 3

28 U.S.C. § 2106 3

28 U.S.C. § 2107 2

33 U.S.C. § 1348(4)(B) 19

33 U.S.C. § 1251 19

33 U.S.C. § 1362(5) 19

42 U.S.C. § 6901 11

42 U.S.C. § 6925 ..... 8, 11, 15

42 U.S.C. § 6928 2

42 U.S.C. § 6972 2

42 U.S.C. § 6973(a) 15

42 U.S.C. § 7413 19

42 U.S.C. § 9601 ..... 11, 12

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS:

40 C.F.R. § 260.10 ..... 8, 13

45 Fed. Reg. 33301 (May 19, 1980) 14, 15, 16

Donald Mitchell, Jr., *"Josyln v. James* Returning to the Mainstream of American Law" 5 Toxics Law Rptr. 1647 ..... 12, 22

COURT RULES:

Fed.R.App. P. 4 2

Fed.R.App. P. 56 ..... 2, 23

Sup.Ct.R. 29.1 3

Sup.Ct.R. 10.1(a) 10

Sup.Ct.R. 10.1(c) 11

Sup.Ct.R. 13 3

Sup.Ct.R. 14.1(a) i

Sup.Ct.R. 14.1(b) ii

Sup.Ct.R. 14.1(d) 2

Sup.Ct.R. 14.1(e) 2

Sup.Ct.R. 14.1(f) 8

No. _____

In The

Supreme Court of the United States

October Term, 1991

PRODUCTION PLATED PLASTICS, INC., MICHIGAN CITY PLASTICS CO., INC., AND MICHAEL J. LADNEY,

Petitioners,

v.

UNITED STATES OF AMERICA, Frank J. Kelley, Attorney General for the State of Michigan, ex rel; Michigan Department of Natural Resources Commission; Gordon E. Guyer, Director of the Michigan Department of Natural Resources,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, Michael Ladney, by and through his attorneys, Law, Weathers & Richardson of Grand Rapids, Michigan, hereby petitions the Court for a writ of certiorari so that the United States Supreme Court may review the questions presented for review for the reasons contained herein.

JURISDICTION AND OPINIONS BELOW

Under Sup.Ct.R. 14.1(d) and (e), petitioner notes the official and unofficial reports of decision below and the grounds upon which the jurisdiction of this Court is invoked:

1. In a joint complaint, the plaintiff-appellee, United States, originally brought an action pursuant to Sections 3308(a) and (g) of RCRA, being 42 U.S.C. §6928(a) and (g), and the plaintiff-appellee, state of Michigan brought this action pursuant to Section 7002(a) of RCRA, 42 U.S.C. §6972(a), as well as Section 48 of the Michigan Hazardous Waste Management Act ("HWMA"), MCL 299.548; MSA 13.30(48). Both governmental plaintiffs sought permanent injunctive relief and the imposition of civil penalties. Accordingly, the United States District Court for the Western District of Michigan, Southern Division had jurisdiction over this case under 28 U.S.C. §1331, §1345, and §1355.

2. The district court granted a partial summary disposition under Fed. R. Civ. P. 56, finding corporate and individual liability, in an opinion dated May 14, 1990. *United States v. Production Plated Plastics, Inc.*, 742 F. Supp. 956 (W.D. Mich 1990) See A-1.[1] The district court issued further summary disposition relief on the issue of remedies through an opinion dated January 24, 1991. *United States v. Production Plated Plastics*, 762 F. Supp. 722 (W.D. Mich 1991). See A-18. This latter opinion was converted into a permanent injunction which was entered by the court on April 25, 1992, and timely appealed by the Defendants-Appellants, Michael Ladney, Production Plated Plastics, ("PPP") and Michigan City Plastics, ("MCP") on May 24, 1991. Accordingly, the Defendants-Appellants' appeal to the 6th Circuit Court of Appeals was timely. See 28 U.S.C. §2107, Fed. R. App. P. 4.

---

[1] The citation form "A-___" refers to the page number in the appendix to this petition.

3. The United States Circuit Court of Appeals for the 6th Circuit affirmed the trial court orders and opinions through a two page, unpublished opinion dated and entered on February 20, 1992. See A-46. Accordingly, the present petition for writ of certiorari is timely and the Supreme Court has jurisdiction to accept the issues presented for review pursuant to 28 U.S.C. §2101, 28 U.S.C. §2106, and Sup.Ct.R. 13.

STATEMENT OF CASE (FACTS)

Production Plated Plastics ("PPP") is a Michigan corporation with one plant located near the Village of Richland, Michigan, in a rural, agricultural area approximately ten (10) miles from the city of Kalamazoo, Michigan. PPP was a chrome plating plastic part manufacturer whose primary business was automotive supply. Michigan City Plastics ("MCP") is an Indiana corporation with one plant in Michigan City, Indiana. MCP was also an automotive plastic part manufacturer, and owned all of PPP's stock. Michael Ladney is a 74 year old resident of Florida who owns 68% of MCP's stock and is the president of both companies. See A-3, 4. There are no other parent or subsidiary companies to be disclosed pursuant to Sup.Ct.R. 29.1.

PPP purchased the Richland plant in 1969 from Amerace Corporation which built the facility, including its waste lagoons. The waste lagoons were necessary because the plant had no access to city sewer services. Approximately 10% of the solid waste ("sludge") in the lagoons was generated by Amerace. PPP had wanted to dispose of its sludge off-site but instead was instructed by the State Department of Natural Resources ("MDNR") to discharge all of its sludge and process water wastes on-site. At all times, PPP operated the lagoons with a state discharge permit. In fact, at all times, all of PPP's waste was pretreated under a state approved methodology which supposedly rendered the waste inert. In fact, the sludge itself was a by-product of this pretreatment process.

In 1977, before RCRA was implemented, groundwater contamination was discovered under the PPP plant and the plaintiff State of Michigan through its Department of Natural Resources ("MDNR") sued PPP in Kalamazoo County Circuit Court to remediate this problem. In 1978, PPP and the State executed a state court consent decree which was to "phase" the closure of the plating sludge lagoons. 742 F. Supp. at 958. From that date, no new sludge was deposited on the site, although until a sewer line could be extended from the City of Kalamazoo, (a task finally completed in late 1987), the Company had no option but to use the lagoons for treated process water and cleansed water from a purge system which was also installed and operated pursuant to the State Court Order. This "State Court Closure Plan" required the Company to secure an extension of city sewer service to the plant, as well as to gradually remove all existing sludge on the property and purge and clean the groundwater contamination.

All phases of this State Court Closure Plan were underway in 1980 when federal RCRA provisions became applicable to the site. PPP complied with RCRA's requirements by submitting a RCRA "Part A" application. Originally, PPP's application listed Mr. Ladney's name as the "Installation's legal owner"; however, a revised Part A application which was accepted by the federal government, substituted "Production Plated Plastics, Inc." as the owner and operator of the facility. 742 F.Supp. at 959, 963; A-13.

The district court found that PPP lost its "interim status" in November of 1985 since it was unable to satisfy "Part B" of the RCRA application, which was then due. PPP couldn't satisfy Part B's obligations because PPP lacked the ability to demonstrate sufficient financial resources to close the site. 742 F. Supp. at 959; A-8. When PPP was unable to produce such financial assurances, it became "obligated" under RCRA to provide within 15 days a closure plan which would require that all waste to

be removed from the site within 180 days and which, ironically, also required proof of adequate financial assurances to insure the removal (closure) of all waste within 180 days. 742 F. Supp. at 961; A-8.

Although PPP did not meet the 15 day closure plan submission requirement, it submitted a RCRA closure plan on March 26, 1986, and revisions on October 14, 1986 and July 29, 1987. 742 F. Supp. at 959. These PPP prepared RCRA closure plans coordinated the closure details and timetables with the State Court Closure Plan. Although the plaintiff, United States of America ("USEPA") advised PPP that its plan was generally acceptable, it noted that PPP failed to submit the required financial assurances which, ironically, necessitated the submission of the plan in the first place. For this reason, in April of 1987, the USEPA and MDNR sued PPP and Michael Ladney in an effort to compel the production of such financial assurances. Despite earlier USEPA communications which indicated that the State Court Closure Plan's rate of removal was acceptable, the Complaint also sought the removal of all waste within 180 days. See A-3, 4.

In an opinion on May 14, 1990, the Federal District Court for the Western District of Michigan granted summary disposition to the governmental plaintiffs under Fed. R. Civ. P. 56. The court found that PPP had violated RCRA's requirement to submit a closure plan within 15 days of the loss of interim status and to complete partial and final closure activities within 180 days after the State's approval of the closure plan. 742 F. Supp. at 961; A-8.

Relying on the "imminent hazard" section of RCRA, a RCRA section under which the governmental plaintiffs were not even suing, the district court also held that RCRA imposes personal joint and several liability on corporate officers and employees who "actually make corporate decisions", apparently irrespective of whether such decisions relate to hazardous waste management. 742 F. Supp. at 963; A-12, 13.

Under its enumerated standard, the district court found Mr. Ladney liable because as the President of PPP there is a "natural and reasonable inference that he had an important say in or actually made the corporate decisions." 742 F. Supp. at 963; A-14. The district court also relied on an Affidavit of Mr. Ladney which the court believed had been submitted in the present case, although it actually had been submitted in the state court case. The district court interpreted this affidavit as containing an assertion by Mr. Ladney that he had ultimate decision-making authority, although no such assertion is contained in the Affidavit. Finally, the court relied on the deposition testimony of PPP's environmental specialist, Steve Noble, wherein he indicated his belief that Mr. Ladney was a corporate officer of PPP and that he was in daily telephone contact with the plant's manager, Mr. William Evans. 742 F. Supp. at 963; A-14.

In reality, both Mr. Noble and the other environmental specialist whose deposition was submitted, James Breitenbach, testified that they had never met Mr. Ladney and had never talked to him. Neither of these two individuals nor Mr. Evans, the plant manager linked Mr. Ladney to any waste management decision made by PPP generally, nor to the specific actions or inactions which the district court found to have violated RCRA See Exhibits to R73 – Noble Deposition, A-49-51; Breitenbach Deposition, A-52-54.

Despite the fact that the defendants pled impossibility to perform and demonstrated their financial inability to remove the 7600 cubic yards of sludge on the site within 180 days, and despite the court's earlier indication that it would consider such arguments when fashioning relief, see 742 F. Supp. at 961; A-10, the district court in a January 24, 1991 Opinion, granted the governmental plaintiff's request under Fed. R. Civ. P. 56 for permanent, mandatory injunctive relief compelling the defendants to remove the hazardous waste on the site

within 180 days, establish a groundwater monitoring plan and establish a post-closure plan. See A-18.

At this point in time, the defendants found themselves in an impossible situation. MCP had ceased operations in 1987 and had no liquid assets. PPP had ceased operations in 1989 and had virtually no liquid assets. Mr. Ladney lacked sufficient cash or liquidity to pay for the removal of all sludge on the property.

Fortunately, in the spring of 1991, a company in which Mr. Ladney is a principal and which holds certain intellectual property rights obtained a one-time $3,000,000 royalty payment on technology totally unrelated to PPP or MCP. This technology has been developed by Mr. Ladney in the last few years, independent from his activities with PPP or MCP. This intellectual property company loaned Mr. Ladney three million dollars for the PPP clean-up.

In light of these practical problems, the district court's January 24, 1991 Opinion was not memorialized into a permanent injunction order until April 25, 1991. See A-42.

All the sludge was removed from the site in the summer of 1991, although the defendants ran out of funds before 2,000 yards of contaminated soils could be removed. An alternate groundwater plan has been submitted and approved by the USEPA and the MDNR, although the defendants lack the funds to implement it. In addition, on the site, post-closure and corrective action are likely tasks, with at least post-closure directed by the April 25, 1991 Order. These are expensive projects for which Mr. Ladney, PPP and MCP lack the operating capital. Furthermore, the governmental plaintiffs are intent on seeking the imposition of RCRA penalties and fines against all defendants.

In a two page per curiam opinion issued on February 20, 1992, the Sixth Circuit Court of Appeals affirmed the district court rulings without discussion or analysis of the personal liability issues. See A-46, 47.

STATUTORY PROVISIONS INVOLVED

Pursuant to Sup.Ct.R. 14.1(f), the petitioner cites the following provisions of RCRA which are involved in this issue:

> Not later than 18 months after October 21, 1976, the administrator shall promulgate regulations requiring each person owning or operating a facility for the treatment, storage or disposal of hazardous waste identified or listed under this Sub-chapter to have a permit issued pursuant to this section. Such regulations shall take affect on the date provided in Section 6930 of this Title and upon and after such date the treatment, storage or disposal of any such hazardous waste is prohibited except in accordance with such a permit.

42 U.S.C. §6925(a).

The USEPA has promulgated rules defining the terms "operator" and "owner" as follows:

> "Operator" means the person responsible for the overall operation of a facility.
>
> "Owner" means the person who owns the facility or part of a facility.

40 C.F.R. §260.10[2].

---

[2] Mr. Ladney has also been summarily adjudged personally liable under Michigan Hazardous Waste Management Act ("HWMA"), M.C.L. §299.548. In all material ways, this state statute mirrors RCRA. For example, M.C.L. 299.555(1) defines "operator" as " . . . the person responsible for the overall operation of a disposal, treatment, or storage facility with approval of the director either by contract or license." Moreover, the rules promulgated by the MDNR under the HWMA provides the following definitions:

(Continued on following page)

ARGUMENT

INTRODUCTION

In American business law, the distinction between corporate debt and personal obligation is among the most fundamental precepts:

> It is elemental jurisprudence that a corporation is a creation of the law, endowed with a personality separate and distinct from that of its owners, and that one of the principal purposes for legal sanctioning of a separate corporate personality is to accord stockholders an opportunity to limit their personal liability.

Berger v. Columbia Broadcasting System, Inc., 453 F. 2d 991, 994 (5th Cir. 1972).

There is no mystery in the motivation for this doctrine of limited liability. All of us want to protect our personal goods and effects from the liabilities of commerce. By satisfying this basic need, this principle of separating corporate liabilities from those of the individuals who own its shares, occupy its boardrooms, or orchestrate its commercial affairs has so fueled our economic system that this Court itself has taken judicial notice of its "useful purpose in business life." See, e.g. *Moline Properties v. Commissioner*, 319 U.S. 436, 439 (1943).

Despite its traditional, elemental, and useful nature, the doctrine of limited liability of corporate officers for the acts of the corporation is presently under an intense

---

(Continued from previous page)

"Operator" means the person responsible for the overall operation of the facility.

"Owner" means the person who owns a treatment, storage or disposal facility or part of such a facility, including the title holder of the land in which the facility is located.

1985 A.A.C.S. R299.9106(d) and (e).

judicial attack. This attack is virulent because it is occurring within the most costly theater of liability facing corporate America in our generation, namely environmental liability.

This attack is also corrupted with a false passion because although emblazoned with "polluters will pay" rhetoric, the opinions of most federal courts throughout the country on this issue actually impose liability on employees for the waste disposal practices of their corporate employers without any proof of personal negligence, individual fault, or even, such as in the present case, without any evidence that the official played a role in the corporate decisions leading to the alleged statutory violations.

This novel and unprecedented assignment of no-fault personal liability for the strict liabilities of a corporation is also insidious because none of the participant cases are based on a reasoned analysis of the statutes or regulations involved. In reality, no proper jurisprudential analysis could support such a finding.

Only one circuit has refused to join this self-propagating judicial body. Lighting a beacon for the rules of statutory interpretation, the Fifth Circuit has firmly declined to assign employee and officer liability for the statutory environmental violations of a corporation, at least absent more express Congressional intent. *Joslyn Manufacturing Co. v. T.L. James & Co., Inc.*, 893 F.2d 80 (5th Cir. 1990).[3]

As this Court will see below, certiorari is therefore justified in this case on the basis that there is now a split of authority in the federal courts of appeals. See Sup.Ct.R.

---

[3] *Joslyn* is a CERCLA case, but its rationale is equally applicable to RCRA and given the uniform judicial practice of treating personal liability under the statutes equally, see discussion *infra* at p. 11, the *Joslyn* decision should be considered to be in conflict with the Sixth Circuit Court of Appeals' decision in this case for purposes of Sup.Ct.R. 10.1(a).

10.1(a). Certiorari is also warranted because the courts finding personal liability for corporate RCRA violations, including the ones here, have violated this Court's precedent regarding the interpretation of statutes. See Sup.Ct.R. 10.1(c).

The most compelling reason, however, for this Court to review the federal question presented in this case is that the specter of personal liability for the enormous environmental liabilities of corporate America is so potentially deleterious to our system of capital investment and business development that this Court, our only true national court, should evaluate whether such liability exists, and if it does, articulate the standards defining the assignment of such liability. See Sup.Ct.R. 10.1(c).

I.

RCRA AND ITS REGULATIONS ARE NOT INTENDED TO IMPOSE JOINT AND SEVERAL LIABILITY ON CORPORATE OFFICERS

The federal courts have uniformly treated liability for individual officers, directors and owners of corporations under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. 6901, *et seq.* and the Comprehensive Environmental Response Compensation Liability Act ("CERCLA"), 42 U.S.C. 9601 *et seq.* as subject to the same standards. Cf. *United States v. Northeastern Pharmaceutical ("NEPACCO") Co.*, 810 F.2d 726, 745 (8th Cir. 1986); Accord, *Kelley v. Arco Industries*, 723 F. Supp. 1214, 1218 (W.D. Mich. 1989). This commonality springs from the fact that these are the nation's two principal statutes governing the generation, disposal and environmental impact of hazardous substances, and the fact that Congress uses the terms "owner" and "operator" as liability triggers in both statutes. See 42 U.S.C. § 6925(a) and 42 U.S.C. § 9601(20)(a).

CERCLA defines "owner" and "operator" in a circular fashion:

> The term 'owner or operator' means . . . any person owning or operating such a [hazardous substance] facility.

42 U.S.C. § 9601(20)(a) (bracketed information added). RCRA does not even attempt a definition of these terms. Neither statute contains any legislative history to suggest that these operative terms were designed to subject corporate employees to joint and several liability with the corporation.

Nevertheless, except in one case, all the federal courts considering this issue have blindly found that this definition applies to the violating corporation and also to a variety of corporate employees, officers or shareholders, although efforts to draw distinctions among such personnel have produced a bevy of different judicial and administrative enforcement standards.

The cases finding joint and several employee liability all have their genesis in *New York v. Shore Realty*, 759 F.2d 1032 (2nd Cir. 1985), which found shareholder liability based on a form of *a priori* logic, rather than a statutory interpretation analysis. Indeed, although upholding the corporate form in another part of the opinion, the second circuit completely failed to analize the effect of the corporate form on the terms "person", "owner" and "operator". Since that case, each federal decision reaching the same result has largely operated by a "gestalt" methodology. They string cite *Shore Realty* and succeeding cases which rely thereon, rather than perform their own statutory analysis. In effect, *Shore Realty* founded an analytical abyss and the subsequent federal courts have felt compelled (or probably relieved) by precedent to move lockstep into the jurisprudential void.[4]

---

[4] This history of *stare decisis* run afoul is well chronicled by commentator Donald B. Mitchell, Jr. in *"Joslyn v James*, Returning to the Mainstream of American Law", 5 Toxics Law Reporter 1647 (May 22, 1991).

Despite the self-authenticating and self-deceiving body of law to the contrary, an application of the rules of statutory construction leaves *no* room for a conclusion that Congress intended the joint and several liability of corporate employees for the RCRA or CERCLA violations of the corporations for whom they work.

For instance, "[i]t is elementary that the meaning of a statute must in the first instance, be sought in the language in which the act is framed." See *Caminetti v. United States*, 242 U.S. 470, 485 (1917). This Court has also consistently ruled that courts must interpret statutes and rules according to their plain meaning, except in the rare instance where a literal application will produce a result demonstrably at odds with the statute's intent. See *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989).

The plain language of RCRA and its rules cannot support officer liability. As noted above, RCRA does not define "owner" or "operator" to include corporate officers, employees or shareholders. Indeed, it does not even define these pivotal terms. While RCRA rules define "operator" and "owner", these definitions are plainly cast in the singular sense, thereby contra-indicating an intent to confer joint liability on corporate employees:

> 'Operator' means *the* person responsible for the overall operation of a [hazardous substance disposal] facility.
>
> 'Owner' means *the* person who owns a [hazardous substance disposal] facility or part of a facility.

40 C.F.R. 260.10[5] (Emphasis and bracketed information added).

---

[5] Mr. Ladney has also been summarily adjudged personally liable under Michigan's Hazardous Waste Management Act ("HWMA"), M.C.L. § 299.548. In all material ways, this State statute mirrors RCRA. For example, M.C.L. 299.55(1) defines "operator" as " . . . *the* person responsible for the overall operation of a disposal, treatment, or storage facility

(Continued on following page)

The USEPA and MDNR presently scoff at the suggestion that the terms "the operator" refer merely to the company in a corporate setting. Yet, when the USEPA promulgated this regulation it expressly stated this proposition. On May 19, 1980, in explaining the definition of "operator" the USEPA stated that:

> "In the case of a corporation or other business entity, the entity is the 'person' with the privileges and *duties.*"

45 Fed. Reg. 33301 (Emphasis added).

After promulgating such a ruling and issuing such an explanation, how can the USEPA in enforcement now claim Mr. Ladney has duties (though presumably no rights) as another "the person" or as a secondary operator?[6]

(Continued from previous page)

with approval of the director either by contract or license." Moreover, the rules promulgated under HWMA provide the following definitions:

> " 'Operator' means *the* person responsible for the overall operation of a facility."
>
> 'Owner' means *the* person who owns a treatment, storage or disposal facility or part of such a facility, including the title holder of the land in which the facility is located."

1985 A.A.C.S. R299.9106(d) and (e) (Emphasis added).

[6] The Administrative Procedures Act, 5 U.S.C. § 552(a)(1) requires that any federal agency promulgate any substantive rule of general applicability. Rules which are not published in the Federal Register as required by the APA are void and cannot be enforced. See *Anderson v. Butz,* 550 F.2d 459 (9th Cir. 1977). Assuming that USEPA now interprets "operator" to include corporations *and* corporate officers, it is incumbent upon USEPA to promulgate this interpretation by rule. At a minimum it should advise the American people in the Federal

(Continued on following page)

In truth, nothing in RCRA suggests that the USEPA in its rule-making erred by defining these terms in their singular. Likewise, nothing in RCRA's legislative history suggests that Congress intended the joint and several liability of corporate officers for the violations of a corporation.[7]

To the contrary, a finding such as in the present case that a corporate employee is jointly and severally liable with the corporation conflicts with the statutory use of the terms "owner" and "operator" in RCRA itself. This is apparent by examining 29 U.S.C. § 6925(a), which is the most basic of RCRA requirements and was the RCRA section Mr. Ladney was alleged to have violated.[8] Subsection 6925a obligates "*each* person owning or operating an existing facility . . . to have a [RCRA] permit . . . " (Emphasis and bracketed information added). It is absurd to suggest that Michael Ladney in this case, and corporate officers generally, violate RCRA if they do not "each" have a permit separate from the corporation to "own" or "operate" a facility. Yet this is the necessary, logical result of the opinions offered in this case.

(Continued from previous page)

Register that corporate officers can share the *duties* of an operator with the corporation in order to effectively rescind or modify its comments at 45 Fed. Reg. 33301.

[7] The USEPA and MDNR argue that there is precedent for ignoring the plain, singular language of this rule. They refer to *United States v. Environmental Waste Control, Inc.*, 710 F. Supp. 1172, 1201-04 (N.D., Ind. 1989). In reality, this case notes in *dicta* how persons in a joint venture or in joint tenancy would jointly be "the person". Such a ruling is consistent with common law assignments of liability. Mr. Ladney and PPP, however, are in no such relationship and common law would not assign them joint liability.

[8] As noted in footnote 9, *supra*, Mr. Ladney was found by the district court to have violated 42 U.S.C. § 6973(a) which is the so-called imminent hazard section of RCRA, Section 7003. This section had absolutely no relevance to this case.

This incongruous multiple "permitting" result which is necessitated by interpreting RCRA as imposing joint liability on corporate employees was recently recognized by a USEPA Administrative Law Judge:

> This parallel structure [RCRA Sections 3004 and 3005] is significant because in issuing RCRA permits under RCRA § 3005, *the Agency does not usually consider corporate officers to be operators of RCRA facilities* that are considered owned or operated by corporations. A RCRA permit is the operative document that makes the Part 264 performance standards applicable to an individual facility, thereby putting all interested persons on notice as to what the facility's obligations are under RCRA. *In my June 1991 request for supplemental briefing, Complainant [US EPA] was expressly invited to cite examples of RCRA permits that specify a corporate officer as an operator, but it failed to provide a single example.* The RCRA permit application specifically instructs applicants that "the legal entity" is to be listed on the application as the operator. When the Agency promulgated the "operator" definition, it expressly rejected the notion that the corporation form should be ignored in determining operator status: "In the case of a corporation or other business entity, the entity is the 'person' with the privileges *and duties.*" See 45 Fed. Reg. 33301 (May 19, 1980).

In the Matter of Southern Timber Products, Inc., RCRA (3008) Appeal No. 89-2, pp 17-19, 6 Toxics Law Reporter, 1276 (March 18, 1992). (Emphasis and bracketed information added).

In fact, the judge in *Southern Timber* was expressly critical of the district court opinion in the present case for wholly failing to square the finding of liability against Mr. Ladney with RCRA's use of the term "operator":

> At least one decision cited in Complainant's [USEPA's] motion suggests that the term "operator" should be read to include anyone with

> ultimate decision-making authority at a corporation that operates a RCRA facility. See *United States v. Production Plated Plastics, Inc.*, 742 F. Supp. 956 (W.D. Mich 1990). *Although the court nowhere mentions RCRA § 7003 in describing the specific counts alleged in the Complaint (id. at 958), it unaccountably relies on § 7003 in deciding the issue of individual liability for the violations at issue. Id.* at 960, 962-63. After quoting § 7003 and citing NEPACCO (a RCRA § 7003 case), the court concludes that "corporate officers and employees who actually make corporate decisions (that lead to a violation) are personally liable under RCRA." Id. at 963. This standard is similar (though not identical) to that set forth in the Stein/Diamond Memo, and like that Memo *the court makes no attempt to reconcile this standard with the text of the "operator" definition.* Because the court relied on RCRA § 7003 in establishing this standard, the case has little analytical value to the issue at hand.

Southern Timber, supra at p 36 fn 47. (Emphasis and bracketed information added).[9]

In addition to pinning its entire statutory analysis on the wrong section of RCRA and ignoring the plain meaning of the relevant RCRA section and rule, the district court also violated this Court's defined statutory interpretation rule that "if Congress intends for legislation to change the interpretation of a judicially created concept it makes that intent specific." *Midlantic National Bank v. New Jersey,* 474 U.S. 494, 501 (1986).

---

[9] The USEPA Judge's critique of the present case is absolutely correct. The district court's clearly erred by relying on Section 7003 of RCRA (imminent hazard) which is the remedial, non-regulatory section of the statute. No violation of this Section was pled much less proved and the Section was thus absolutely irrelevant to the issue of whether Mr. Ladney was liable as an "operator" under Section 3005.

The *Joslyn* courts articulate well this argument. The *Joslyn* district court acknowledged the traditional doctrine of limited liability of corporate officials for corporate liabilities and noted the failure of Congress to express any intent to abrogate this doctrine:

> "Based upon the foregoing authorities, this Court holds that the corporate form, including limited liability for shareholders, is a doctrine firmly entrenched in American Jurisprudence that may not be disregard absent a specific congressional directive. Neither the clear language of CERCLA nor its legislative history provides authority for imposing individual liability on corporate officers or director liability on parent corporations . . . This court will not read into the statute a provision disregard decades of corporation law. The court's conclusion is buttressed by the fact that Congress has in the past, specified that shareholder or controlling parties are to be held responsible for the acts or debts of a valor corporation. See e.g. Depository Institution Management Interlocks Act, Internal Revenue Code, Fair Labor Standards Act, ERISA."

Joslyn Corp. v. T. L. James & Co. Inc., 696 F. Supp. 222, 226 (W.D. La. 1988).

Quoting from this Court's holding in *Edmonds v. Campagnie Generale Transatlantique*, 443 U.S. 256, 267 (1979), the Fifth Circuit affirmed the district court in *Joslyn* and refused to extend liability to offices and directors:

> [S]ilence is most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely. Without an express Congressional directive to the contrary, common-law principles of corporation law, such as limited liability, govern our court's analysis.

Joslyn Manufacturing Co. v. T.L. James & Co., Inc., 893 F.2d 80 (5th Cir. 1990) 893 F.2d at 83.

This Court's requirement that Congress "speak" if it wants to abrogate elementary jurisprudential concepts is especially appropriate for the present issue, because Congress clearly knows how to phrase environmental statutes when it wants liability to be placed upon corporate officers. For example, in the Clean Water Act of 1977, 33 U.S.C. § 1251, et seq., the term "person" triggers liability and is broadly defined to include an individual, corporation, partnership, association, etc. . . 33 U.S.C. § 1362(5). Nevertheless, Congress must not intend "person" to generally include corporate officers because in the "knowing violations" subsection of the Clean Water Act, *and only that subsection*, it expressly adds "responsible corporate" officer to the term "person":

> For purposes of this paragraph, the term 'person' shall mean, in addition to the definition contained in section 1362(5) of this title any responsible corporate officer.

33 U.S.C. § 1348(4)(B).

Likewise, the Clean Air Act notes that for certain limited subsections, "operator" includes "any person who is a senior management personnel or a corporate officer." 42 U.S.C. § 7413(h). The statute exculpates engineers, technicians and other employees carrying out their duties if they are not senior management personnel or corporate officers unless the violations are willful and knowing 42 U.S.C. § 7413(h).

If Congress itself recognizes a need in other environmental statutes to further define the general terms "person" and "operator" to include corporate officers in *limited liability contexts* within those statutes, how can the federal courts presume that Congress intended those same general terms to include corporate officers in broad application throughout RCRA without similar additional language? Stated differently, if "operator" and "person" were intended to make corporate officers jointly liable as the courts in this case have held, then by necessity the additional, specific language in the Clean Water Act and

Clean Air Act is redundant and the standards for such joint liability contained therein, including the restrictions to particular officers in particular instances are nullified.

As this Court is keenly aware, the great danger when courts and enforcement agencies ignore the role of legislators and agency rule-makers to define the law, is that the former will develop their own disparate, discrete and inconsistent standards of liability.

The USEPA administrative law judge in *Southern Timber* expresses his concern on this point, noting with due alarum the fact that the USEPA has no published or even unpublished enforcement standards defining corporate officer liability under RCRA:

> As noted in both the Initial Decision (p. 33) and the Final Decision (p. 16), Complainant's [USEPA's] theory of liability with respect to Mr. Batson has not been consistent throughout this proceeding. Complainant has alternately argued that Batson is liable because he personally participated in or was directly responsible for hazardous waste management at the facility; because he was directly responsible for the impoundment's closure; because he had ultimate decision-making authority for Southern Pine and the facility; because he was a facility "owner"; because the corporation veil should be pierced; or because he acted negligently in attempting to achieve a risk-based closure of the impoundment."

Southern Timber, supra, at 7-8 (Bracketed information added).[10]

---

[10] The absence of a clear standard leads to a form of regulatory tyranny where the EPA and MDNR can threaten or intimidate company officials. In fact, PPP's lawyer has even received the now infamous PRP (potentially responsible party) letter from the MDNR regarding this site.

The absence of enforcement standards for corporate officer liability is not surprising. Since RCRA was not intended to impose such liability, the statute itself contains no such standard. Since the USEPA when rulemaking was self professedly dedicated to preserving the distinction between corporate and personal liabilities, the RCRA rules contain no such standards.

Some federal courts have even acknowledged this vacuum, but instead of recognizing it as a symptom of faulty liability analysis, they have rushed-in to "legislate" their own standards. The judges of the western district of Michigan have been among the most active, and there is no greater proof of the impropriety of this judicial "legislation" than the fragmenting standards for personal environmental liability emerging therein.

In *Kelley v. Arco Industries*, 723 F. Supp. 1214 (W.D. Mich 1989), one of the members of this bench freely notes that neither CERCLA nor RCRA nor their rules establish any standards for employee liability, and that the courts should therefore "respond" with proper standards which evaluate the relative "fault" of corporate officers:

> Imposing liability on a corporate individual is a serious matter, and because CERCLA provides no explicit way to distinguish among corporate actors, the courts should respond with proper standards. Strict liability may be too harsh and broad-sweeping a standard to apply to all corporate "owners" in all cases. Not all employees or managers of a close corporation will necessarily, absent special factors, be liable for a Section 107 claim. Consequently, a more definitive standard seems appropriate. . . .
>
> Here, active, direct, knowing efforts to abate the contamination may work for – not against – a corporate defendant where the acts suggest the individual tried but was unable to prevent or abate the unlawful waste disposal . . . This standard is different, but more stringent on the

> whole than traditional corporate tort liability, yet it requires more than mere status as a corporate officer or director, which under CERCLA would be the equivalent of a strict liability standard. The test – whether the individual in a close corporation could have prevented or significantly abated the release of hazardous substances – allows the fact-finder to impose liability on a case-by-case basis, a result I favor in this area due to the seriousness of potential liability.

Kelley v. Arco Industries, 723 F. Supp. 1214, 1219-1220 (W.D. Mich 1989).

The *Arco* court should be given credit for at least hinting at an understanding of the serious impact that a blanket assignment of corporate officer liability could have on the future development of this country's manufacturing industry. Moreover, commentators have appreciated that the *Arco* court at least has attempted to fill the legislative and rule-making void by devising its own "favored" standard. See Mitchell, *supra*, 5 Toxics Law Reporter at 1653. Where, however, is the statutory authority for such judicial activism? Where is the statutory support for including fault as a standard for individual "operator" liability (laudable as it is), when corporate operator liability is strict? Where is the statutorily enablement for treating officers of close corporations differently than those in public corporations?

To make matters worse, the *Arco* court's neighboring court in the same district applies a different standard of liability. That court, the district court in the present case, looks only to the officer who has "ultimate decision-making authority." *Production Plated Plastics, supra*, 742 F. Supp. at 963. In applying this standard the court will assign RCRA liability to the president of a corporation

based on his status, at least unless the individual can prove that he or she lacked ultimate decision-making authority despite the office. *Id.*[11]

If courts across the land or even in the same courthouse, are each to favor their own distinct standards, federal law cannot be applied uniformly, which is the essential role of the federal courts in our system of federalism. Given the enormous, personal liability at stake, the gross departure from statutory language and case precedent which is occurring on this issue, and the fact that the liability standards are fragmenting not coalescing, this issue begs clarification and delineation by our one unified court.

II.

THE TRIAL COURT CLEARLY DID NOT REVIEW THE EVIDENCE IN A LIGHT MOST FAVORABLE TO MR. LADNEY WHEN IT CONCLUDED THAT LIKE PPP, MR. LADNEY WAS THE PERSON RESPONSIBLE FOR THE OVERALL OPERATION OF THE PPP LAGOONS.

This Court should accept this particular case as the vehicle for reviewing officer environmental liability since its assignment of personal liability merely because of officer status is extreme, and was based on an undeniable error of law and obvious mistake of fact.

The district court concluded that PPP was the operator of the Richland plant's waste facilities. In other words, it found the corporation to be "the person responsible for the overall operation" of the waste lagoons ("RCRA facility") of the Richland plant. The district court additionally concluded under Fed.R.Civ.P. 56 that

---

[11] By definition the directors of the corporation would have to be assigned liability automatically as well under this standard.

Michael Ladney was also the person responsible for the overall operation of the waste lagoon facility.[12]

In finding Mr. Ladney personally liable on summary judgment, the district court relied exclusively on the defendants' various documents and depositions submitted in rebuttal of the plaintiffs' motion for summary disposition on liability. The district court ruled as follows:

> In its review of the parties' briefs and attachments, the Court noted that Defendants have submitted various documents and depositions which in fact provide evidentiary support that Ladney was personally involved in or directly responsible for acts in violation of RCRA and HWMA. Defendants have submitted the deposition of Steven D. Noble, an environmental specialist for PPP. Noble states that Ladney is a corporate officer of PPP who was directly in contact with William Evans. Defendants also have submitted the affidavit of Ladney, as President of PPP, which states that he is competent to testify as to the *facts of this case and in which he asserts decision-making authority.* Finally, Defendants have submitted a letter from Ladney, written in his capacity as President of PPP, outlining PPP's long term plan of operation.

742 F. Supp. at 963; A-13, 14 (Emphasis added).

A review of Mr. Ladney's Affidavit clearly reveals that the district court did not interpret the facts in a light

---

[12] The USEPA and the MDNR rely heavily on the fact that in the initial Part A application, Mr. Ladney was listed as the facility operator. To its credit, the district court did not apparently find this fact probative because, as it pointed out, PPP amended its Part B in compliance with USEA regulations to list the corporation as the operator. 742 F. Supp. at 959. This amended Part A application was accepted by the USEPA years before the alleged RCRA violation occurred.

most favorable to Mr. Ladney, as it should have. See *Schick v. Steiger*, 583 F. Supp. 841 (E.D. Mich 1984). In fact, the absolute opposite is true. The district court strained to interpret this Affidavit in order to support the governmental plaintiffs' position and evidently the district court's preconceived notion that Mr. Ladney should be found liable. Mr. Ladney's Affidavit reads as follows:

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF KALAMAZOO

STATE OF MICHIGAN,
Plaintiff,

v

PRODUCTION PLATED PLASTICS, INC.
Defendant.
_____/

Case No. D 773-046-CE

HON. ROBERT L. BORSOS

AFFIDAVIT OF MICHAEL J. LADNEY

STATE OF MICHIGAN)
) ss.
COUNTY OF MACOMB)

Mike Ladney, being first duly sworn, deposes and says as follows:

1. I have firsthand knowledge of the facts described below and if sworn could testify competently thereon at trial.

2. I am the President of the Production Plated Plastics, Inc. (the "Company"), which operates a facility located in Richland, Michigan.

3. The Company has experienced a market decline in demand for its electro-plated products.

4. The Company intends to layoff some of its employees as a result of the market decline.

5. The Company will retain the employment of personnel necessary to operate the purge wells that treat the ground water for chromium contamination.

6. The sludge removal operation will not be affected by the workforce reduction.

/s/

Michael J. Ladney

See R. 79.

As this Court can readily see, Mr. Ladney's Affidavit was not given in the present case. While the undeniable truth that this Affidavit was offered in a different case does not disqualify it from being used in this case, this fact clearly refutes the district court's finding that Mr. Ladney in this Affidavit stated that "he is competent to testify as to the facts of *this case.*" 742 F. Supp. at 963; A-14 (Emphasis added). Nowhere in the Affidavit does Mr. Ladney testify that he is competent to testify as to the facts of the present federal case nor, for that matter, the state case.

Similarly, the district court, as demonstrated from its opinion above, interpreted this Affidavit as including a provision where Mr. Ladney asserts that he has decision-making authority over environmental remediation at the facility. *Id.* The truth, however, is that Mr. Ladney nowhere in the Affidavit asserts such decision-making authority. To the contrary, he directly states that PPP "operates" the Richland facility. See Paragraph 2 of the Affidavit above. Furthermore, although the Affidavit contains the procedurally necessary acknowledgement that the affiant has first-hand knowledge of the facts described therein, Mr. Ladney describes the decisions made as "Company" decisions, not his. No reference is made at all to any personal decision Mr. Ladney might have made, nor any personal decision-making authority he might have.

The gravamen of the district court's factual finding was that "Mr. Ladney is personally involved in or directly responsible for acts in violation of RCRA and HWMA." 742 F. Supp. at 963. Yet, the district court fails to offer one shred of evidence to support this factual conclusion. Instead, the district court shifted the burden of proof to Mr. Ladney, erroneously stating that he had to prove that as Company President he didn't play a role in these decisions.

Although the district court's transferral of the burden of proof is a reversible error especially in a summary judgment context, Mr. Ladney had in fact offered the necessary rebuttal proofs. He submitted the depositions of Steven Noble and James Breitenbach, the environmental specialists who were responsible for all of PPP's environmental compliance activities, including the activity that allegedly violated RCRA and the HWMA. See Exhibit C attached to R 73; A-49-54. Neither Mr. Breitenbach nor Mr. Noble had ever talked to or even met Mr. Ladney, much less discussed any of their RCRA or HWMA activities. *Id.* In fact, when asked to list the individuals who discussed the waste management practices of PPP and made the decisions which led to the alleged noncompliance with RCRA and HWMA, both Mr. Noble and Mr. Breitenbach mentioned a number of corporate employees. Mr. Ladney's name, however, *does not appear on either list. Id.*

Obviously, it is difficult to prove a negative, but when the governmental plaintiffs failed to connect Mr. Ladney to any of the decisions they claim violate the law, and when the company personnel assigned to make those decisions did not identify Mr. Ladney as someone they conferred with on these decisions, Mr. Ladney had every right to expect that he would at least receive a trial on liability.

In reality, Mr. Ladney was found liable under RCRA merely because he was perceived by the court to have the ultimate decision-making authority at the corporation, as its President. In fact, the USEPA cites the present case for such a proposition in other enforcement actions. See *Southern Timber, supra.* However by corporate definition, such status is also inherent in the directors of the corporation, and if this is the only standard for RCRA personal liability under RCRA for the corporation's violations, then the courts should dispense with any kind of evidentiary requirement and merely declare that corporate officers and directors, at least the president, board chair and directors are, by virtue of their office, strictly liable under RCRA.

Not one of the other courts that have assessed personal liability under RCRA have been willing to abrogate the minimum burden of proof that a corporate individual must be substantially involved in the waste management practices of the company before personal liability is assessed. See *NEPACCO, supra;* 810 F.2d at 745; *United States v. Environmental Waste Control, Inc., supra.* In fact, in another courtroom in the same division of the same district court, the court has rejected the imposition of liability on the "mere status as a corporate officer or director", instead requiring a "heavily fact specific" analysis of whether the officer or director "could have prevented or significantly abated the release of hazardous substances." *Arco, supra,* 723 F. Supp. at 1220.

If not reversed, the present case will stand out as a glaring exception even to the cases which disregard the corporate form and assess personal liability. Given the USEPA's penchant for citing this case for its unique holding in other enforcement actions, its presence will create greater analytical contradiction in an area of enormous liability that is already crowded with jurisprudential confusion.

CONCLUSION

Mr. Ladney's day in court to date has amounted to a district court granting summary judgment against him based on an inapplicable statutory section, a misreading of an affidavit and the testimony of two PPP environmental specialists who had never talked to Mr. Ladney and failed to identify him as a decision-maker on the issues in dispute. His appellate review right constituted a two-page affirmation which completely ignores the personal liability issue, much less reviews his arguments. Clearly, the means are being sacrificed here for the end.

However, Mr. Ladney has exhausted his personal means by spending over three million dollars of his own funds on this site with no end in sight. Since such expenditures are being made pursuant to an injunction, it is questionable whether he can ever discharge the "obligation" irrespective of his personal financial circumstances.

If the lesson taught in this case is that by investing time and money in an American plant, an individual can lose everything he owns without fault and despite the protections offered by the corporate form, and can be, in fact, further dogged by a mandatory order enforceable by contempt for the rest of his life, then one would be irresponsible indeed to invest in American manufacturing. If our society is to risk such a result for the sake of contributions in environmental clean-ups, which are marginal overall, then clearly Congress, which unlike the courts can be held accountable, should so dictate.

This Court should grant a writ of certiorari and reverse the decisions of the Western District Court of Michigan and the Sixth Circuit Court of Appeals which

found and affirmed the liability of Mr. Ladney for PPP's RCRA violations.

Respectfully submitted,

LAW, WEATHERS & RICHARDSON, PC

DOUGLAS W. VAN ESSEN (P33169)
Attorneys for Petitioner

Business Address & Telephone:
Suite 500, 200 Ottawa Ave., NW
Grand Rapids, Michigan 49503
(616) 459-1171

APPENDIX

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, *et al.*,

Plaintiffs,

v.

PRODUCTION PLATED PLASTICS, INC., et al.,

Defendants.
_____/

File No.
K87-138 CA
Hon. Benjamin F. Gibson

OPINION

(Filed
May 14, 1990)

INTRODUCTION

Plaintiffs United States of America, Frank J. Kelley, Attorney General for the State of Michigan, the Michigan Natural Resources Commission, and Gordon E. Guyer, Director of the Michigan Department of Natural Resources (collectively the "government"), filed the present action for permanent injunctive relief and imposition of civil penalties against defendants Production Placet Plastics, Inc., Michigan City Plastics, Inc., Michael J. Ladney, Jr. [sic],[1] and Marguerite Ladney, pursuant to Sections 3008(a) and (g) of the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. §§ 6928(a) and (g), and Section 48 of the Michigan Hazardous Waste Management Act ("HWMA"), M.C.L.A. § 299.548. Plaintiffs allege that defendants operated a hazardous waste

facility and stored and disposed of hazardous waste at defendant's Richland, Michigan facility ("PPP facility") in violation of RCRA and HWMA.

More specifically, Count 1 of plaintiffs' complaint alleges violations of Section 3005(a) and (e) of RCRA, 42 U.S.C. § 6925(a) and (e), and the RCRA regulations, 40 C.F.R. Part 265, by discharging hazardous waste into unlined surface impoundments and by operating waste piles without an RCRA permit or RCRA interim status. Count 2 alleges a violation of Section 3005(e) of RCRA, 42 U.S.C. § 6925(e), and the RCRA regulations, 40 C.F.R. § 265.112, by failing to submit a closure plan for the surface impoundments and waste piles within 15 days after termination of the interim status, and by failing to commence or complete closure in a timely manner. Count 3 alleges a violation of Section 3005(e) of RCRA, 42 U.S.C. § 6925(e), and the RCRA regulations, 49 C.F.R. § 265.118, by failing to submit a post-closure plan for the surface impoundments and an adequate post-closure plan for waste piles. Count 4 alleges a violation of Sections 6 and 22 of HWMA, M.C.L.A. §§ 299.506, .532, for the continued operation of an unlicensed hazardous waste storage and disposal facility.[2]

Presently pending before the Court is plaintiffs' motion for partial summary judgment as to the issues of defendants Production Plated Plastics, Inc.'s and Michael J. Ladney's liability under RCRA and HWMA pursuant to Federal Rule of Civil Procedure 56. For the reasons stated below, plaintiffs' motion for partial summary judgment is granted.

FACTS

Defendant Production Plated Plastics, Inc. ("PPP") is a corporation which has engaged in molding, electroplating, and painting of plastic parts primarily for the automotive industry since commencing operations in 1966. The manufacturing processes involve creation, discharge, and storage of hazardous wastes.

In 1977, the Michigan Department of Natural Resources ("MDNR") filed an action in state court against PPP seeking to enjoin PPP from discharging wastes and seeking to order PPP to remove wastes pursuant to the Water Resources Commission Act, M.C.L.A. §§ 323.1 *et seq.* The state court entered a consent order in 1978 requiring PPP to remove sludge and to install and operate purge wells. Subsequent modifications of the order specified the minimum amounts of sludge PPP was required to remove per month as part of remediation and ordered other remediation procedures.

On August 18, 1980, pursuant to newly enacted RCRA requirements, defendants provided the Environmental Protection Agency ("EPA") a "Notification of Hazardous Waste Activities," listing specific hazardous wastes that were generated, treated, stored, and disposed of at the PPP facility. The notification form listed Michael J. Ladney, Jr., as the "Installation's Legal Owner." PPP also provided the EPA with a Part A permit application for permission to continue to treat, store or dispose of hazardous wastes at the PPP facility. Submission of the Part A application automatically granted PPP interim status to continue operations pending review of their

application. *See* 42 U.S.C. § 6925(e)(1); 40 C.F.R. § 270.70(a). The Part A application listed Ladney as the facility's owner and operator and was signed by Ladney. PPP submitted a revised Part A application on or about January 17, 1985, changing the facility's legal owner to "Production Plated Plastics, Inc."

In July 1984, PPP submitted a Part B permit application. In February and October of 1985, the EPA notified PPP of deficiencies in the second part of their application. PPP acknowledged, by letters dated November 5, 1985, and November 20, 1985, that it could not meet the RCRA financial responsibility requirements, although it claimed a good faith effort to obtain insurance. Nonetheless, PPP continued to discharge hazardous waste. However, on July 16, 1986, the Associate Regional Counsel for the EPA wrote a letter to PPP stating that the "EPA will approve the rate of removal of waste proposed in the closure plan that is in accordance with the order of the Kalamazoo County Circuit Court."

PPP filed a "Piled and Buried Sludge Closure" plan and subsequent revisions with the EPA on March 26, 1986, October 14, 1986, and July 29, 1987. PPP also filed a "Tentative Surface Impoundment Closure Plan" and subsequent revisions with the EPA on May 20, 1986, February 25, 1987, and on August 12, 1987. On September 30, 1988, the State of Michigan apparently approved the proposed closure plans. It is not clear to what extent PPP has complied with such plans to date.

STANDARD FOR REVIEW

Summary judgment is appropriate when "there is no genuine issue as to any material fact and the moving

party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Atlas Concrete Pipe, Inc. v. Roger J. Au & Son, Inc.*, 668 F.2d 905, 908 (6th Cir. 1982). There is no material issue of fact for trial unless, by viewing the evidence in favor of the non-moving party, a reasonable jury could return a verdict for that party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Boddy v. Dean*, 821 F.2d 346, 349 (6th Cir. 1987). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249 (citations omitted).

The party moving for summary judgment hears the initial responsibility of informing the court of the basis for its motion and identifying those portions of the record which demonstrate the absence of a material issue of fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Potters Medical Center v. City Hospital Association*, 800 F.2d 568, 572 (6th Cir. 1986). Once the moving party has met its burden, the non-moving party must go beyond the pleadings and come forward with specific facts to show that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 322-24. If after adequate discovery the party hearing the burden of proof fails to make a showing sufficient to establish an essential element of his claim, summary judgment is appropriate. *Id.*

APPLICABLE LAW & ANALYSIS

RCRA was enacted as an amendment to the Solid Waste Disposal Act in an attempt by Congress to deal with problems posed by the general disposal of wastes in this country as well as the particular problems associated with the disposal of hazardous substances. Pub. L. No.

94-580, 1976 U.S. Code Cong. & Admin. News (90 Stat.) 2795, 2798; H.R. Rep. No. 1491, 94th Cong., 2d Sess., pt. 1, at 2-5, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6238, 6239-43. The Act, amended three times since its initial enactment,[3] authorizes the EPA to identify hazardous wastes, to promulgate standards for operators of hazardous waste facilities, and to issue permits for the operation of hazardous waste disposal facilities. *See* 42 U.S.C. §§ 6921-25. Under the Act, a civil suit may be brought against "any person . . . who has contributed or who is contributing to such handling, storage, treatment, transportation, or disposal." 42 U.S.C. § 6973(a). RCRA is a remedial strict liability statute which is construed liberally. *United States v. Aceto Agricultural Chemical Corp.*, 872 F.2d 1373, 1383 (8th Cir. 1989); *United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726, 738 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

The 1980 amendments to RCRA, effective November 19, 1980, required each owner and operator of a "facility for the treatment, storage, or disposal of hazardous waste" to obtain a permit. 42 U.S.C. § 6925(a). However, facilities in operation at the time of enactment of the permit requirement were granted interim status in order to operate without an RCRA permit pending administrative action on the permit application. 42 U.S.C. § 6925(e).

In 1984, RCRA was amended to terminate interim status if certain conditions were not satisfied. The 1984 amendment provides that:

> In the case of each land disposal facility which has been granted interim status under this subsection before November 8, 1984, interim status shall terminate on the date twelve

> months after November 8, 1984, unless the owner or operator of such facility –
>
> > (A) applies for a determination regarding the issuance of a permit under subsection (c) of this section for such facility before the date twelve months after November 8, 1984; and
> >
> > (B) certifies that such facility is in compliance with all applicable groundwater monitoring and financial responsibility requirements.

42 U.S.C. § 6925(e)(2). Thus, under this section, a facility was required to submit a Part B permit application certifying compliance with applicable groundwater monitoring and financial responsibility requirements before November 8, 1985. If the facility failed to satisfy the above conditions, interim status was lost as of November 8, 1985. 42 U.S.C. § 6925(e)(2)(A); 40 C.F.R. § 270.73; 50 Fed. Reg. 38946, 38946-49 (Sept. 25, 1985); 50 Fed. Reg. 28701, 28723-24 (July 15, 1985). Further, if the hazardous waste treatment storage and disposal facility lost its interim status, the owner or operator of the facility was required to submit a closure plan and post-closure plan to the EPA within fifteen days of the termination of interim status and to complete partial and final closure activities within 180 days after the EPA's approval of the closure plan. *See* 40 C.F.R. §§ 265.112(d)(3)(i), 265.118(e)(1), 265.113(b).

The government has the initial responsibility of establishing the absence of a material issue of fact for trial regarding RCRA and HWMA liability. The government has established that PPP is the owner or operator of a

hazardous waste facility which stored and disposed of waste both before and continuing after November 19, 1980. Thus, under the 1980 amendments, PPP automatically was granted interim status with the submission of its Part A application. However, PPP failed to certify compliance with the financial responsibility requirements mandated by the 1984 amendments, failed to obtain an RCRA permit, and failed to meet RCRA deadlines for having permitted land disposal units and adequate underground monitoring. Thus, as a matter of law, PPP lost interim status as of November 8, 1985. *See United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726, 738 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987). Nonetheless, PPP continued its waste activities. Furthermore, defendants failed to submit required closure and post-closure plans within the appropriate time periods. Accordingly, plaintiffs have established a *prima facie* case of liability.

Plaintiffs having established a *prima facie* case of liability, the Court next must consider defendants PPP's and Ladney's defenses in order to determine whether summary judgment with regard to liability is appropriate. In attempts to avoid liability and in opposition to partial summary judgment, PPP and Ladney deny violating RCRA and HWMA, arguing that compliance with the state court ordered remediation closure plan complies with the intent and requirements of RCRA and HWMA and was accepted by the EPA, that plaintiffs are estopped from seeking a closure plan inconsistent with the state plan, that defendants' inability to comply with the financial responsibility requirements of RCRA regulations

excuses lack of compliance, and that plaintiffs have selectively enforced this action against them in violation of equal protection and due process.

A. COMPLIANCE WITH STATE PLAN/ESTOPPEL

As their first defense, defendants argue that timely filings with the EPA and compliance with the state court ordered lagoon closure plan satisfy the intent of RCRA. Defendants urge the Court to review the provisions of the state court closure plan in light of RCRA's objectives and the impact on such plan if PPP was forced to cease operations due to its inability to meet the financial responsibility requirements. Further, defendants argue that representations by the EPA that the state closure plan was acceptable to the EPA estops the EPA from bringing the present enforcement action.

After conducting a complete review of the file, record, and prior proceedings in this matter, the Court concludes that the consent judgment in state court does not relieve PPP of obligations under RCRA. The Court finds no authority for the proposition that compliance with a state remedial order excuses an RCRA violation. The Court recognizes the frustration underlying defendants' arguments, but finds that the state court proceedings do not change the fact that they have violated RCRA. Rather, defendants' arguments may be considered in fashioning an appropriate remedy. Furthermore, the Court does not believe that the EPA letter dated July 16, 1986 excuses liability, although again such fact may be relevant when appropriate damages and/or penalties are assessed.[4]

Accordingly, the Court concludes that defendants' first defenses do not excuse defendants from liability for RCRA and HWMA violations.

B. INABILITY TO SATISFY FINANCIAL RESPONSIBILITY REQUIREMENT

Next, relying on *United States v. T & S Brass & Bronze Works, Inc.*, 681 F. Supp. 314 (D. S.C. 1988), defendants apparently argue that since it was impossible for them to satisfy the financial responsibility requirements, they are excused from complying with RCRA requirements. However, the Court notes that in *T & S Brass*, although not controlling authority over this Court's disposition of the matter, the district court held that neither T & S Brass' argument that it made a good faith attempt to obtain insurance nor that insurance was impossible to obtain were sufficient defenses. On appeal, the Fourth Circuit, affirming in part and vacating in part, also rejected the impossibility defense. *United States v. T & S Brass & Bronze Works, Inc.*, No. 88-3531, slip op. at 4 (4th Cir. Dec. 22, 1988) (per curiam) (unpublished).

After reviewing the facts of this case and the existing caselaw, the Court concludes that neither an impossibility defense nor good faith efforts to secure financial assurances are defenses to liability after November 8, 1985, although such efforts are pertinent to the appropriate remedies or imposition of sanctions. *See United States v. Clow Water Systems, A Division of McWane, Inc.*, 701 F. Supp. 1345, 1348 (S.D. Ohio 1988); *United States v. Allegan Metal Finishing Co.*, 696 F. Supp. 275, 285 (W.D. Mich. 1988); *T & S Brass & Bronze Works*, 681 F. Supp. at 321.

Thus, the Court concludes that this defense also does not preclude a finding of liability.

C. SELECTIVE ENFORCEMENT

Finally, defendants argue that this action is constitutionally invalid since the government has selectively enforced RCRA and HWMA against defendants in bad faith or arbitrarily while others similarly situated have not been prosecuted. Defendants argue that the site at issue, which is a compliant company on a non-dangerous site, does not appear on the MDNR's list of hazardous waste sites requiring remediation, while many dangerous sites on the list have not been subjected to enforcement actions.

The government generally is afforded a presumption of validity in the enforcement of federal statutes and its discretion in enforcing federal statutes is extremely broad, although not unfettered. *See Wayte v. United States*, 470 U.S. 598, 607-10 (1985); *Ovler v. Boles*, 368 U.S. 448, 456 (1962). In order to state a *prima facie* selective prosecution defense, defendants bear a heavy burden of establishing that (1) defendants have been singled out while other similarly situated violators were left untouched, and (2) that the government selected defendants for prosecution "invidious[ly] or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent the exercise of [their] constitutional rights." *United States v. Bustamante*, 805 F.2d 201, 202 (6th Cir. 1986); *United States v. Hazel*, 696 F.2d 473, 474 (6th Cir. 1983).

The Court finds no proof of selective prosecution other than defendants' mere allegations and arguments in their brief which are not sufficient to raise an issue of material fact. Defendants have provided no proof that similarly situated violators have not been cited for RCRA violations. Furthermore, even if defendants had satisfied the first element of a selective enforcement defense, there also is no evidence of governmental vindictiveness, that the selection was based on race, religion or some other arbitrary classification which would support finding a denial of equal protection, or that the government engaged in intentional, purposeful discrimination which would meet defendants' heavy burden of establishing a *prima facie* case of selective enforcement. As a result, the Court finds that defendants' selective enforcement defense does not preclude summary judgment as a matter of law.

Accordingly, since defendants have failed to present a valid defense to liability, summary judgment solely on the issue of liability is appropriate in favor of plaintiffs and against defendant PPP.

D. INDIVIDUAL LIABILITY UNDER RCRA

Since the Court has determined that defendant PPP is liable for violations of RCRA and HWMA, the Court must determine whether a question of fact exists regarding whether defendant Ladney is jointly liable for such violations. An action alleging violations of RCRA may be brought against "any person (including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or

disposal facility)." 42 U.S.C. § 6973(a). Thus, corporate officers and employees who actually make corporation decisions are personally liable under RCRA. *United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726, 745 (8th Cir. 1986).

In their complaint, plaintiffs allege that Ladney is the owner or operator of PPP. Defendants dispute plaintiffs' allegations and argue that plaintiffs must be able to prove that Ladney plays an active role in controlling the waste management policies and practices of PPP in order to hold Ladney personally liable for the alleged violations. However, although defendants do agree that Michigan City Plastics, Inc. ("MCP") owns PPP and that Ladney owns 68% of MCP's stock, defendants contend that there is no evidence that Ladney actively controls MCP or plays an active role in controlling the waste management policies and practices of PPP.

Plaintiffs respond that Ladney's name appears as the "Installation's Legal Owner" on the initial "Notification of Hazardous Waste Activities" and on the Part A application. However, the Court notes that the revised Part A application substituted "Production Plated Plastics, Inc." as the legal owner of the facility. Plaintiffs also contend that in his deposition, William Evans, PPP's plant manager, stated that he frequently discussed the manufacturing of products with Ladney.

In its review of the parties' briefs and attachments, the Court notes that defendants have submitted various documents and depositions which in fact provide evidentiary support that Ladney is personally involved in or directly responsible for acts in violation of RCRA and

HWMA. Defendants have submitted the deposition of Steven D. Noble, an environmental specialist for PPP. Noble states that Ladney is a corporate officer of PPP who is in daily contact with William Evans. Defendants also have submitted the affidavit of Ladney, as president of PPP, which states that he is competent to testify as to the facts of this case and in which he asserts decision-making authority. Finally, defendants have submitted a letter from Ladney, written in his capacity as president of PPP, outlining PPP's long-term plan of operations.

The Court, viewing the evidence submitted in the light most favorable to the nonmoving party and drawing all reasonable inferences, finds that the evidence shows that Ladney was actively involved in the day-to-day operations of PPP. Defendants assert in their briefs that plaintiffs have not established that Ladney was actively involved in the operations of PPP. However, defendants provide no evidence that Ladney is not PPP's owner or operator. Defendants offer no explanation of the statements made in Ladney's affidavit which indicate that he is the ultimate decision-making authority, or how, as president of PPP, he is to be excluded from the natural and reasonable inference that he had an important say in or actually made the corporate decisions. Accordingly, the Court holds Ladney jointly liable with PPP for RCRA and HWMA violations.

CONCLUSION

The Court concludes that no genuine issue of material fact exists with regard to defendants PPP's and Ladney's liability, thus plaintiffs are entitled to judgment

as a matter of law. In reaching its decision, the Court has not considered the appropriateness of civil penalties and/or injunctive relief. Although PPP and Ladney have been found liable as a matter of law, the issue of appropriate remedies and/or penalties will be considered in light of the state court orders and in conjunction with defendants' various defenses.

The Court recognizes that this is a unique case. Although RCRA and HWMA requirements have not been met and defendants are liable for RCRA and HWMA violations, the Court encourages continual attempts by the parties to resolve this matter and notes that it will consider factors such as the state court proceedings and steps taken pursuant to such proceedings when fashioning the appropriate relief warranted.

/s/ Benjamin F. Gibson
BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

DATED: May 14, 1990

FOOTNOTES

1. Unless otherwise indicated, references to "Ladney" refer to defendant Michael J. Ladney, Jr., and not to defendant Marguerite Ladney.

2. HWMA authorizes the continued operation of a facility that was in existence on the effective date of the 1982 Act, March 30, 1983, if certain conditions were met. One of the conditions is compliance with the federal solid waste disposal act regulations, 42 U.S.C. §§ 6901 *et seq.*

M.C.L.A. § 299.522(c). An owner or operator of a hazardous waste facility in Michigan is required to comply with RCRA and HWMA, administered by both the EPA and the State of Michigan. *See* 42 U.S.C. §§ 6926; 6928(a)(2).

3. The initial statute was amended by the Quiet Communities Act of 1978, Pub. L. No. 95-609, § 7, 1978 U.S. Code Cong. & Admin. News (92 Stat.) 3079, 3081-84; Solid Waste Disposal Act Amendments of 1980, Pub. L. No. 96-482, 1980 U.S. Code Cong. & Admin. News (94 Stat.) 2334; Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 1984 U.S. Code Cong. & Admin. News (98 Stat.) 3221.

.4. The Court notes that as a general rule equitable defenses such as estoppel are not available against the sovereign when it is asserting public rights. *See, e.g., Costello v. United States,* 365 U.S 265, 281 (1961); *Pan American Petroleum & Transport Co. v. United States,* 273 U.S. 456, 506 (1927); *Chesapeake & Delaware Canal Co. v. United States,* 250 U.S. 123, 125 (1919). "Where the defenses of unclean hands or laches have been used against the government when it is asserting public rights, courts have repeatedly held that equitable principles will not be applied to thwart public policy or the purpose of federal laws." *Kelley v. Thomas Solvent Co.,* 714 F. Supp. 1439, 1451 (W.D. Mich. 1989).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, *et al.*,

Plaintiffs,

v.

PRODUCTION PLATED PLASTICS, INC., *et al.*,

Defendants.

_____/

File No. K87-138 CA

Hon. Benjamin F. Gibson

ORDER

(Filed May 15, 1990)

At a session of the Court held in and for said District and Division in the City of Grand Rapids, Michigan, this 14th day of May, 1990.

PRESENT: HON. BENJAMIN F. GIBSON, DISTRICT JUDGE

In accordance with the Opinion dated May 14, 1990, IT IS HEREBY ORDERED that plaintiffs' motion for partial summary judgment is GRANTED.

IT IS SO ORDERED.

/s/ Benjamin F. Gibson
BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, *et al.*,

Plaintiffs,

v.

PRODUCTION PLATED PLASTICS, INC., *et al.*,

Defendants.

_____/

File No. K87-138 CA

Hon. Benjamin F. Gibson

OPINION

Plaintiffs United States of America, Frank J. Kelley, Attorney General for the State of Michigan, the Michigan Natural Resources Commission, and Gordon E. Guyer, Director of the Michigan Department of Natural Resources (collectively the "government"), filed the present action for permanent injunctive relief and imposition of civil penalties against defendants Production Plated Plastics, Inc. ("PPP"), Michigan City Plastics, Inc. ("MCP"), Michael J. Ladney, Jr., and Marguerite Ladney,[1] pursuant to Sections 3008(a) and (g) of the Resource Conservation and Recovery Act of 1976 ("RCRA" or the "Act"), 42 U.S.C. §§ 6928(a) and (g), and Section 48 of the Michigan Hazardous Waste Management Act ("HWMA"), M.C.L.A. § 299.548.

On May 14, 1990, this Court determined that defendants Michael J. Ladney Jr. ("Ladney") and PPP operated a hazardous waste facility and stored hazardous waste at

their Richland, Michigan facility (the "Richland facility") in violation of RCRA and HWMA. Specifically, Ladney and PPP violated Sections 3005 (a) and (e) of RCRA, 42 U.S.C. § 6925(a) and (e), and the RCRA regulations, 40 C.F.R. Part 265, by discharging hazardous waste into unlined surface impoundments and by operating waste piles without an RCRA permit or RCRA interim status. They also failed to submit required closure and post-closure plans and commence and complete closure of the Richland facility within the time periods required by RCRA Section 3005(e) and 40 C.F.R. §§ 265.112 and 265.118. These RCRA violations in turn amounted to violations of Sections 6 and 22 of HWMA, M.C.L.A. §§ 299.506 and 299.522, for the continued operation of an unlicensed hazardous waste storage and disposal facility.[2]

Now pending before the Court is plaintiffs' motion for partial summary judgment as to appropriate injunctive relief pursuant to Federal Rule of Civil Procedure 56. Plaintiffs request that the Court order PPP and Ladney:

> (i) to conduct, complete and certify closure pursuant to all terms and conditions of the closure plan approved by the State of Michigan, as required by 40 C.F.R. § 265.112(d);
>
> (ii) to provide financial assurance for closure in accordance with 40 C.F.R. § 265.143;
>
> (iii) to comply with all financial responsibility requirements of 40 C.F.R. § 265.147; and
>
> (iv) to comply with all groundwater monitoring requirements in 40 C.F.R. Part 265 Subpart F.

For the reasons stated below, the motion is granted in part and denied in part.

I.

A. Statutory and Regulatory Guidelines

In 1976 Congress enacted RCRA, 42 U.S.C. §§ 6901 *et seq.*, to regulate the disposal of solid waste in the United States. The overriding concern of the legislation is to minimize the adverse environmental impact of solid waste, especially hazardous waste. Its objectives are "to promote the protection of health and the environment and to conserve valuable material and energy resources." 42 U.S.C. § 6902(a).[3] To meet those objectives congress fashioned a far ranging regulatory scheme which is designed to encourage solid waste planning by states and fund resource recovery projects.

Specifically, Section 3004(a) of RCRA requires that the United States Environmental Protection Agency ("EPA") Administrator promulgate regulations establishing performance standards for owners and operators of hazardous waste facilities "as may be necessary to protect human health and the environment." 42 U.S.C. § 6924(a).[4] Section 3005(a) provides for regulations "requiring each person owning or operating an existing facility . . . for the treatment, storage, or disposal of hazardous waste identified or listed under this subchapter to have a permit issued pursuant to this section." 42 U.S.C. § 6925(a). The issuance of operating permits is the primary mechanism established in RCRA for enforcing the hazardous waste regulatory scheme with respect to the owners and operators of treatment, storage, and disposal facilities.

Under section 3005(e) a hazardous waste management facility that was in existence on November 19, 1980, could obtain authority to continue operations as an "interim status" facility by filing a "Part A application" with the EPA. The Part A application requires information concerning the nature of the applicant's business, a scale drawing, photographs and a topographic map of the facility, a description of its hazardous waste management processes and the design capacity of these processes, a specification of the types and quantities of hazardous wastes processed, stored or disposed of at the facility as well as information regarding permits or construction approvals received or applied for by the facility. 40 C.F.R. § 270.14. An interim status facility's operation is limited to the types of wastes and procedures specified in the Part A application and the facility must comply with the operating standards of 40 C.F.R. § 265.

Recognizing widespread noncompliance with the basic regulatory requirements of RCRA, Congress amended the Act in 1984 to provide that all interim status hazardous waste land disposal facilities would automatically lose their interim status unless they certified by November 8, 1985, that they were in compliance with all applicable groundwater monitoring and financial responsibility requirements. 42 U.S.C. § 6925(e)(2). Upon losing interim status the facility must immediately cease its hazardous waste management operations and within fifteen days the owner or operator of the facility must submit a "closure" plan for approval by the regional administrator of the EPA. 42 U.S.C. § 6925(a); 40 C.F.R. § 265.112(d)(3)(i).[5] The public is provided an opportunity to comment on the submitted plan. 40 C.F.R.

§ 265.112(d)(4). The regional administrator must approve, modify, or disapprove the plan within ninety days of its receipt. If the regional administrator modifies or disapproves the plan, the owner or operator has thirty additional days to modify the plan or submit a new plan. Finally, the regional director must approve or modify this plan within an additional sixty days. If the regional director modifies the plan, it becomes an approved plan. *Id.* The owner or operator may apply for an amendment of the plan at any time prior to closure of the facility by submitting a written request to the regional administrator. After review, the proposed modifications must be accepted or rejected by the regional administrator. 40 C.F.R. § 265.112(c).

The facility must begin final closure within ninety days of approval of a closure plan and must complete closure within 180 days of approval of the closure plan, unless the regional administrator permits an extension of the closure period. 40 C.F.R. § 265.113. After closure is complete, the owner or operator is required to maintain post-closure care of the facility for a period of thirty years unless the regional administrator finds that a shorter post-closure care period is sufficient to protect human health and the environment. 40 C.F.R. § 265.117.

The regulations also require that the owner or operator of a surface impoundment landfill or land treatment facility used to manage hazardous waste must implement a groundwater monitoring system capable of determining the facility's impact on the quality of groundwater in the uppermost aquifer underlying the facility. 40 C.F.R. §§ 265.90 *et seq.* The groundwater monitoring requirement

applies during the active life of the facility and throughout the post-closure care period. 40 C.F.R. § 265.111.

Along with the closure, post-closure and monitoring requirements, the owner or operator must establish and maintain financial assurance for proper closure and post-closure care of the facility, as well as liability coverage of specified amounts for bodily injury and property damage to third parties resulting from sudden accidental occurrences at the facility. 40 C.F.R. §§ 265.140 *et seq.* These financial responsibility requirements are designed to ensure that funds are available to close the facility and maintain post-closure monitoring of the facility. An owner or operator has a variety of options to choose from in establishing financial assurance. Among these are establishment of a closure trust fund, obtaining a surety bond guaranteeing payments into a closure trust fund, obtaining a letter of credit or sufficient closure insurance, or passing a financial test set out in the regulations. 40 C.F.R. § 265.143.

Finally, RCRA provides a mechanism by which a state can administer its own program in lieu of the federal program, although the state authorized program may be enforced by the federal government as well as the state. 42 U.S.C. § 6926. Michigan has been granted "Phase I" authorization by the EPA to regulate hazardous wastes through HWMA. HWMA was designed to track RCRA and is the state law equivalent of RCRA. All the regulations of 40 C.F.R. § 265 are adopted by reference in Rule 1003 of regulations promulgated pursuant to HWMA. Mich. Admin. Code § 299.11003(1)(n).

B. Facts

PPP has engaged in the molding, electroplating, and painting of plastic automobile parts at its Richland facility since 1969. The manufacturing processes involve the creation, discharge, and storage of hazardous wastes. On August 18, 1980, PPP provided the EPA a "Notification of Hazardous Waste Activities", listing specific hazardous wastes that were generated, treated, stored, and disposed of at the Richland facility. PPP also provided the EPA with a Part A application in order to achieve interim status pursuant to RCRA. At this time PPP identified 5,955 tons of listed hazardous waste in surface impoundments and a waste pile at the Richland facility. PPP was not able to meet the financial responsibility requirements of RCRA and so lost its interim status on November 8, 1985. Nevertheless PPP continued operating its hazardous waste management facility without a license until December 7, 1987. Although the proper timetable was not followed, a closure plan which estimated the total cost of closure at $2,300,000 was eventually submitted by PPP and approved by the Michigan Department of Natural Resources ("MDNR") on September 30, 1988. On October 19, 1989, and November 1, 1989, respectively, PPP submitted proposed amendments to the approved closure plan. On December 11, 1989, MDNR provided PPP with a Notice of Deficiency concerning the proposed amendments, and the amendments were never approved. PPP has entirely failed to implement the approved plan.

PPP and Ladney have also failed to meet the financial responsibility requirements of RCRA and have not implemented a groundwater monitoring system pursuant to

RCRA. However, they assert that they have implemented a similar groundwater monitoring and purge system under a consent order entered in a previous lawsuit brought by the MDNR in state court.

In their motion for partial summary judgment, plaintiffs argue that RCRA is a strict liability statute which is to be construed liberally in order to effectuate its remedial goals. Once PPP and Ladney were found liable for violations, an injunction requiring them to comply with RCRA should issue as a matter of law. An approved closure plan is in existence, and if PPP and Ladney had followed the timetable include in the approved plan, closure of the Richland facility would have been complete by now. Given RCRA's overriding concern with minimizing hazardous waste's "present and future threat to human health and the environment", plaintiffs contend the RCRA requirements should be implemented immediately.

PPP and Ladney answer that it is inappropriate to grant a permanent mandatory injunction at the summary judgment stage. Defendants assert that their compliance with a state court order and their alleged inability to fulfill RCRA's financial responsibility requirements are mitigating circumstances which the Court must take into account in fashioning injunctive relief. It is alleged that these mitigating circumstances require the Court to conduct an evidentiary hearing. Further, defendants argue that they cannot fulfill RCRA's financial responsibility requirements and that their implementation of a groundwater monitoring system required by a state court order precludes this Court from requiring them to implement

another groundwater monitoring system pursuant to RCRA regulations.

II.

Summary judgment is appropriate when "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Atlas Concrete Pipe, Inc. v. Roger J . Au & Son, Inc.*, 668 F.2d 905, 908 (6th Cir. 1982). There is no material issue of fact for trial unless, by viewing the evidence in favor of the non-moving party, a reasonable jury could return a verdict for that party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Boddy v. Dean*, 821 F.2d 346, 349 (6th Cir. 1987). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249 (citations omitted).

The party moving for summary judgment bears the initial responsibility of informing the court of the basis for its motion and identifying those portions of the record which demonstrate the absence of a material issue of act. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Potters Medical Center v. City Hospital Association*, 800 F.2d 568, 572 (6th Cir. 1986). Once the moving party has met its burden, the non-moving party must go beyond the pleadings and come forward with specific facts to show that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 322-24. If after adequate discovery the party bearing the burden of proof fails to make a showing sufficient to establish an essential element of his claim, summary judgment is appropriate. *Id.*

The hornbook rule regarding injunctive relief is that in order to prevail a plaintiff must prove that there is no adequate remedy at law, that the plaintiff may suffer an irreparable injury if an injunction is not granted and that the balance of the equities justifies an injunction. For this reason an evidentiary hearing is normally required before injunctive relief may be granted. *United States v. McGee,* 714 F.2d 607, 613 (6th Cir. 1983). However, it has been held that when the plaintiff is a governmental entity, or private attorney general, and the activity may endanger public health, injunctive relief is proper without undertaking a balancing of the equities. *Environmental Defense Fund, Inc. v. Lamphier,* 714 F.2d 331, 337-38 (4th Cir. 1983). Likewise in cases of public health legislation, the emphasis in balancing the equities shifts from irreparable injury to concern for the general public interest. *Id.*

The Supreme Court has recently held that when environmental legislation is at issue the court's focus should be on the *purpose* of the legislation. An injunction should not automatically issue whenever there is a statutory violation. Only if the conduct complained of thwarts the legislative purpose and the statute specifically provides for injunctive relief may the court issue an injunction without undertaking a balancing of the equities or finding irreparable injury. *Amoco Production Co. v. Gambell,* 480 U.S. 531, 542-43 (1987); *See also Weinberger v. Romero-Barcelo,* 456 U.S. 305, 313 (1982).

Even applying the traditional equity standards though, an injunction is normally the proper remedy for violations of an environmental statute. There is rarely an adequate remedy at law for an environmental injury, the injury is usually irreparable, and the important role of the

public interest often shifts the balance of the equities in favor of equitable relief. *Gambell,* 480 U.S. at 545. *See also Lamphier,* 714 F.2d at 338 (when an injunction is authorized by statute irreparable injury need not be shown); *United States v. White,* 769 F.2d 511, 515 (8th Cir. 1985) (If the prerequisites for a statutory remedy have been demonstrated and an injunction will fulfill the legislative purpose then the injunction should be granted).

III.

A. Implementation of Approved Closure Plan

Plaintiffs request that this Court order PPP and Ladney to finally implement the closure plan approved by the MDNR on September 30, 1988. As a preliminary matter defendants argue that injunctive relief is an inappropriate remedy to grant at the summary judgment stage and that the traditional standards for equitable relief require the Court to conduct an evidentiary hearing. This argument fails for two reasons.

First, it simply is not true that an evidentiary hearing is always required before an injunction is issued. When the evidence presented by affidavit and other documentation clearly establish the plaintiff's right to an injunction, a hearing need not be conducted. *American Can Co. v. Mansukhani,* 814 F.2d 431, 425 (7th Cir. 1987); *Socialist Workers Party v. Illinois State Board of Elections,* 566 F.2d 586 (7th Cir.), *affirmed* 440 U.S. 173 (1979). *See McCarthy v. Briscoe,* 429 U.S. 1317, 1324 (1976).

Moreover, as discussed above, the traditional requirements for injunctive relief are less rigid when environmental legislation is at issue. Following the Supreme

Court's decision in *Gambell*, if the purpose of the legislation is thwarted by failure to comply, and the legislation specifically authorizes injunctive relief, no finding of irreparable injury or balancing of the equities need be made. Even if these traditional prerequisites are considered by the court, equitable relief will often issue given that an environmental injury is usually irreparable, plaintiffs rarely have an adequate remedy at law, and special weight must be given to the public interest in balancing the equities.

Because no material issue of fact remains as to defendants' liability, two issues now face the Court concerning the appropriateness of granting injunctive relief. First, does defendants' violation thwart the purpose of RCRA? If it does, an injunction should issue as a matter of law. Second, if the violation is not directly at odds with RCRA's purpose, is an injunction nevertheless compelled by a balancing of the equities?

As to the first issue, the purpose of RCRA as stated in its declaration of policy is to minimize hazardous waste's "present and future threat to human health and the environment." 42 U.S.C. § 6902(b). In failing to implement a closure plan mandated by RCRA, defendants are acting directly at odds with the stated purpose of RCRA. Every day that the Richland facility remains unclosed the threat from the hazardous waste stored there goes unabated. In addition, the Act specifically authorizes the issuance of injunctive relief to effectuate its goals. 42 U.S.C. § 6928(a)(1). Under the *Gambell* analysis it is clear that once liability has been established, as it has been here, an injunction ordering compliance with RCRA's closure requirements must be granted.

Even applying the traditional standards for issuing injunctive relief, implementation of the approved closure plan is mandated. It is evident that despite defendants' assertions to the contrary there is no adequate remedy at law.[6] Money damages will not close the Richland facility. Given the harm already caused by defendants' violations and the continuing threat to human health and the environment, closure is the only adequate remedy. If the facility is to be closed pursuant to RCRA, it must be closed by the owners or operators. There is no other mechanism to effectuate closure under the Act. irreparable injury is established by the nature of hazardous wastes, and in weighing the public interest the Court notes once again that RCRA is specifically designed to protect the public from the threat of harm caused by hazardous waste. As long as closure of the facility is not completed, that threat exists and is sufficient in itself to compel closure. *See USEPA v. Environmental Waste Control Inc.*, 917 F.2d 327, 332 (7th Cir. 1990) (Permanent injunction pursuant to RCRA was supported by potential danger to environment and public health.)

The only "equity" in the balance which weighs in defendants' favor is that closure of the facility will be expensive. Defendants maintain that they do not presently have the $2,300,000 necessary to complete closure and that imposition of the requested relief will simply lead to contempt citations being issued against defendants. Defendants rely on the affidavit of Thomas Hinsberg, a certified public accountant, for the proposition that they do not have adequate funds to implement the approved closure plan.[7] In examining this argument the Court is cognizant of the fact that defendants had the

financial wherewithal to operate the Richland facility for over two years *after* it lost interim status. RCRA is designed to ensure that closure takes place at a time when owners and operators have the funds necessary to comply. If Ladney and PPP had fulfilled their obligations under RCRA beginning on November 8, 1985, the facility would have been closed some time in early 1986. Now, almost five years after closure should have been complete [sic], there is no equity in permitting defendants to escape liability because they claim not to have the funds necessary to meet that liability.

It is also apparent that upon ordering defendants to close the facility today they are not required to deliver full payment for closure tomorrow. There is no requirement in RCRA that the entire cost of closure be paid at once. Defendants' main concern seems to be that they hold many non-liquid assets which will take some time to liquidate. Although the approved plan estimates that closure will cost $2,300,000, implementation of the plan will likely cost substantially less. There is nothing which prohibits defendants from beginning the closure process immediately. As it becomes necessary to expend more funds, assets can be liquidated to satisfy defendants' obligations until closure is complete. In any event defendants' unsubstantiated assertion that they are unable to pay for closure is an insufficient reason to deny injunctive relief. Plaintiffs have satisfied their burden of proving that a permanent injunction is warranted and the Hinsberg affidavit, relying as it does on unsubstantiated statements made by defendants, does nothing to raise a material issue of fact for trial.

Finally defendants contend that it is impossible for them to implement the approved closure plan because of changes in the rules and regulations applicable to disposal of hazardous wastes. They submit the affidavit of Ronald C. Waybrant, an environmental consultant, which states that the approved closure plan does not provide for "stabilization" of the wastes before they are placed in a landfill. Waybrant maintains that stabilization is now required before the wastes may be buried. He also avers that the approved closure plan relies on the assumption that a specific smelter in Canada would be available to process certain sludges now stored at the Richland facility. He states that the smelter cannot process the sludge at the rate required by the plan.

After reviewing the approved closure plan the Court concludes that Waybrant's assertions are in error. The plan requires that wastes be treated "at a licensed hazardous waste management facility that will render the waste acceptable for disposal in accordance with the land ban restrictions specified in 1988 40 C.F.R. § 268.33 and 268.40." Approved Closure Plan, Modification 12. According to the affidavit of Kathleen Clancy, an environmental engineer employed by the MDNR, this requirement includes provision for stabilization of the waste. Waybrant's testimony does not identify which regulations now require stabilization or where the approved plan runs afoul of those regulations. The weight of the evidence, viewed in defendants' favor, establishes that the approved plan is in compliance with the applicable EPA regulations. Likewise, the plan makes no mention of the smelter in Canada.[8] There is no reason to believe that the plan cannot be fully implemented today.

In any event, defendants may propose amendments to the approved plan if the circumstances upon which the plan was based have changed. In fact, they are required to amend the plan if "unexpected events require a modification." 40 C.F.R. § 265.112(c). The Court is informed that an amended plan is being prepared or recently has been prepared by Waybrant. There are administrative processes outlined in RCRA through which these proposed amendments will be reviewed by the EPA. Currently though the only approved plan is the 1988 plan and it must be implemented as expeditiously as possible.[9]

B. Provision of Financial Assurance

Plaintiffs request that defendants be ordered to provide financial assurance for closure in accordance with 40 C.F.R. § 265.143. Defendants maintain that this relief is inappropriate because they are unable to comply and plaintiffs have an adequate remedy at law, namely, a money judgment for a sum certain.

Viewing the totality of the evidence before it, the Court suspects that defendants are not being forthright in their assertion that they cannot provide financial assurance. They rely once again on the affidavit of Thomas Hinsberg as evidence of their inability to comply. It seems fair to say that if defendants had been acting in good faith for the past five years in attempting to comply with RCRA they could now present the Court with better evidence of their financial condition than a single affidavit which is admittedly untrustworthy and based on unsubstantiated statements of the defendants and their employees.

Still, the financial assurance requirement is secondary to the main goal of implementing the approved closure plan. Defendants are not required to provide financial assurance before they implement the plan. This provision is designed to guarantee that funds will be available to complete closure and ultimately post-closure maintenance in the event that defendants fail to fulfill their closure and maintenance obligations. Applying the Supreme Court's *Gambell* analysis and giving defendants the benefit of the doubt, it does not appear that an injunction is necessary on this issue at this time. The overriding purpose of RCRA is not to ensure that defendants provide financial assurance, so an injunction should not issue as a matter of course on this issue and the Court must undertake an equitable analysis. Based on the evidence presently before the Court there appears to be little threat of irreparable injury from failure to immediately provide financial assurance. After all, defendants are required to immediately implement the approved closure plan. The public interest will be protected by implementation of the closure plan and plaintiffs may have an adequate remedy at law in the form of a money judgment. This matter is scheduled for trial beginning on February 4, 1991, and at this time one of the main issues before the Court will be defendants' failure to provide financial assurance. The Court expects that defendants will come forward with more reliable evidence of their respective financial situations than they have presented at this juncture.

C. Compliance With Liability Requirements

Plaintiffs also request that the Court order defendants to fulfill their liability requirements pursuant to 40 C.F.R. § 265.147. This issue is almost identical to the financial assurances issue discussed above. Although the Court is not satisfied with defendants' contention that they are not able to meet this responsibility, this requirement is not of the same urgency as the issue of closure. Again, plaintiffs may have an adequate remedy at law and based on the evidence presently before the Court a balance of the equities appears to weigh in defendants' favor. Resolution of this issue will await trial.

D. Compliance With Groundwater Monitoring Requirements

Plaintiffs' final request is for an order compelling defendants to comply with RCRA's groundwater monitoring requirements pursuant to 40 C.F.R. Part 265 Subpart F. From the Court's previous finding of liability, it is clear that defendants are required to implement a groundwater monitoring system. Under an equitable analysis of the present situation the issuance of an injunction in favor of the plaintiffs would now be warranted except for an issue of fact that has yet to be resolved.

Defendants claim that an adequate groundwater monitoring and purge system was installed at the Richland facility this part year. Apparently this system was installed pursuant to a 1984 state court order arising out of earlier state court litigation. In support of this assertion defendants offer the affidavit testimony of Nathan B. Driggers, corporate counsel for PPP. He contends that the

installed system was approved by the MDNR, and defendants imply in their brief (although they do not state outright) that the system satisfies RCRA. Although plaintiffs correctly argue that compliance with the state order does not excuse compliance with RCRA, it would be inequitable to order defendants to do duplicate work. Plaintiffs' basis for their assertion that no groundwater maintenance system has yet been installed is a July 31, 1989, MDNR report. Given Driggers' affidavit asserting that a system was installed in 1990, questions of fact remain as to the existence of the system and its adequacy under RCRA. Plaintiffs do not rebut defendants' evidence that this new system has been installed and that it fulfills the RCRA requirements. Accordingly summary judgment on this issue is inappropriate.

IV.

For the reasons stated above, plaintiffs' motion for partial summary judgment is granted in part and denied in part. Plaintiffs are ordered to provide this Court with a detailed proposed Order granting a permanent injunction as to defendants' implementation of the 1988 approved closure plan and compliance with RCRA's closure provisions, in accordance with the foregoing opinion. The proposed Order should specify exactly what activities defendants are required to undertake and should incorporate the terms and timetable of the approved closure plan.

/s/ Benjamin F. Gibson
BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

DATED: January 24, 1991

FOOTNOTES

1. Marguerite Ladney and the government have reached a stipulated settlement and the claims against her have been voluntarily dismissed. References to "Ladney" refer to defendant Michael J. Ladney, Jr. and not to defendant Marguerite Ladney.

2. Although the May 14, 1990, opinion does not discuss MCP's liability, the Court is informed that MCP will stipulate to its liability. Accordingly, the only issue remaining in this action is the appropriate relief to be assessed against Ladney, PPP, and MCP.

3. RCRA further states:

> The Congress hereby declares it to be the national policy of the United States that wherever feasible, the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible. Waste that is nevertheless generated should be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment.

42 U.S.C. § 6902(b).

4. Section 1004 of RCRA provides:

> (5) The term "Hazardous waste" means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may –
>
> > (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or
> >
> > (B) pose a substantial present or potential hazard to human health or the environment

> when improperly treated, stored, transported, or disposed of, or otherwise managed.

42 U.S.C. § 6903(5). Pursuant to the requirements of Section 3001 of RCRA, the Administrator has promulgated regulations identifying hazardous waste characteristics and specific hazardous wastes. 40 C.F.R. § 261, subparts C and D.

5. 40 C.F.R. § 265.111 requires that a hazardous waste management facility must be closed in a manner that:

> (a) Minimizes the need for further maintenance, and
>
> (b) Controls, minimizes or eliminates, to the extent necessary to protect human health and the environment, post-closure escape of hazardous waste, hazardous constituents, leachate, contaminated run-off, or hazardous waste decomposition products to the ground or surface waters or to the atmosphere, and
>
> (c) Complies with the closure requirements of this subpart.

6. Defendants maintain that they are entitled to have a money judgment, rather than an injunction, entered against them in order that their contribution claims against various third-parties may survive. However, there is no reason to believe that any valid contribution claim will be prejudiced by granting injunctive relief. Defendants may pursue these claims in separate proceedings. In any event, the availability of RCRA's remedies do not hinge on a defendant's ability to seek contribution.

7. Despite defendants' assertion that the Court must "believe" what is stated in the affidavit, taken at face value the affidavit is worthless. Hinsberg did not conduct an audit of PPP or Ladney. The basis for his conclusion

that defendants do not currently have $2,300,000 is a letter from Ladney and information he received from unnamed PPP Personnel. In other words Hinsberg's affidavit is based solely on unsubstantiated information provided by defendants. He even states, "None of the aforementioned financial information from Mr. Ladney and PPP has been audited, reviewed or compiled by me in accordance with generally accepted accounting principles and *I do not express any form of assurance on it*" (emphasis added). If defendants' own expert witness cannot attest to the truth of what he asserts, the Court is perplexed as to why it must "believe" the affidavit.

8. Given several misstatements of fact contained in his affidavit, it is unclear whether Waybrant's testimony refers to the approved closure plan. Plaintiffs offer the theory that he is relying on PPP's proposed amendments which were received and rejected by the EPA in the fall of 1989. PPP never understood an appeal from the rejection of these amendments, and so they are irrelevant at this point.

9. Defendants raise two additional objections to ordering closure of the Richland facility, neither of which has merit. First, they contend that their compliance with the state court order and inability to provide financial assurance are mitigating circumstances to consider in granting the appropriate relief. Although the Court determined in its May 14, 1990, opinion that these circumstance [sic] may be considered in fashioning the appropriate relief, at a minimum PPP and Ladney are strictly liable for closure of the facility. The Court cannot order the defendants to do less than RCRA minimally requires. If mitigation is warranted, it may only be considered in assessing monetary fines and/or money damages at trial.

Second, defendants argue that providing financial assurance is a prerequisite to closure. Because they have

not provided financial assurance they contend they cannot be compelled to close the facility. Defendants are in error. Although financial assurance is an important part of the RCRA's stautory [sic] and regulatory scheme, it is not a necessary prerequisite, either logically or within the Act's framework, to implementation of an approved closure plan. If the statute required otherwise, closure could easily be avoided by any defendant claiming to have inadequate funds. Congressional intent is clear that closure, not financial assurance, is the overriding concern of RCRA.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, *et al.*,

Plaintiffs,

v.

PRODUCTION PLATED PLASTICS, INC., *et al.*,

Defendants.

_____/

File No. K87-138 CA

Hon. Benjamin F. Gibson

ORDER

(Filed Jan. 24, 1991)

At a session of the Court held in and for said District and Division in the City of Grand Rapids, Michigan, this 24th day of Jan., 1991.

PRESENT: HON. BENJAMIN F. GIBSON, DISTRICT JUDGE

In accordance with the Opinion dated January 24, 1991, IT IS HEREBY ORDERED that plaintiffs United States and the State of Michigan's motion for partial summary judgment is GRANTED IN PART and DENIED IN PART.

IT IS FURTHER ORDERED that plaintiffs prepare a proposed Order, in accordance with the Opinion dated January 24, 1991, granting a permanent injunction as to defendants' compliance with their statutory duty to close their Richland, Michigan facility.

IT IS SO ORDERED.

/s/ Benjamin F. Gibson
U.S. District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, *et al.*,

Plaintiffs,

vs.

PRODUCTION PLATED PLASTICS, INC., MICHAEL J. LADNEY, JR., MICHIGAN CITY PLASTICS, INC., et al.,

Defendants.

Case No. K87-138-CA

Honorable Benjamin F. Gibson

ORDER OF PERMANENT INJUNCTION

(Filed April 26, 1991)

At a session of said Court held in the Federal Building, Kent County, Grand Rapids, Michigan, on the 25th day of April, 1991.

PRESENT: HONORABLE BENJAMIN F. GIBSON
United States District Court Judge

The Court being fully advised in the premises, and an Opinion and Order previously having been entered by the Court on January 24, 1991, now, therefore;

IT IS ORDERED:

1. On September 30, 1988, the Michigan Department of Natural Resources ("MDNR") approved, with modifications, a Surface Impoundment Closure Plan and a

Piled and Buried Sludge Closure Plan, both of which were received by MDNR on or about July 29, 1987, for Defendants' electroplating facility located at 9899 East D Avenue, Richland, Michigan (the "Richland Facility"). These Closure Plans were approved pursuant to the requirements of the Resource Conservation and Recovery Act ("RCRA"), 42 USC 6901 *et seq*, and the Michigan Hazardous Waste Management Act ("HWMA"), 1979 PA 64, as amended, MCL 299.501 *et seq;* MSA 13.30(1) *et seq*. The Closure Plans, as approved by MDNR, are attached hereto, incorporated by reference, and made an enforceable part of this Order Of Permanent Injunction.

2. Defendants Production Plated Plastics, Inc. ("PPP"), Michael J. Ladney, and Michigan City Plastics, Inc. ("MCP") shall implement the terms and conditions of the approved Closure Plans, as modified by MDNR, to achieve timely closure of the RCRA/HWMA-regulated surface impoundments, buried sludges, piled sludges ("waste pile"), and associated traffic-loading areas located at the Richland Facility.

3. Defendants PPP, Michael J. Ladney, and MCP shall commence closure activities pursuant to the terms and conditions of the approved Closure Plans promptly upon entry of this Order Of Permanent Injunction. Closure of the surface impoundments, buried sludges, waste pile, and associated traffic-loading areas shall be conducted, completed, and submitted for certified compliance in compliance with the following schedule:

Activity	Surface Impoundment Closure	Piled And Buried Sludge Closure
(a) Construction of decontamination facility (surface impoundment closure only)	2 Weeks*	
(b) Complete sludge removal	16	10
(c) Complete soil sampling, analysis, and removal	24	18
(d) Equipment decontamination	25	19
(e) Decontamination facility removal (in piled and buried sludge closure schedule only)		20
(f) Grade area	26	21
(g) Closure certification submittal	34	29

*Weeks to be calculated thirty (30) days from the date of entry of this Order.

4. If Defendants PPP, Michael J. Ladney, and MCP cannot achieve clean closure of the surface impoundments, buried sludges, waste pile, and associated traffic-loading areas, as required by RCRA, HWMA, and the terms and conditions of the approved Closure Plans, then they shall fully comply with the post-closure care requirements of 40 C.F.R. Part 265, adopted by reference in *Mich.*

Admin. Code, R. 299.11003(1)(n), including, without limitation, the submittal of post-closure plan(s) for the Richland Facility for MDNR review and approval.

5. By April 30, 1991, Defendants PPP, Michael J. Ladney, and MCP shall submit to MDNR for its review and approval an alternate groundwater monitoring program for the Richland Facility in compliance with 40 C.F.R. Part 265, Subpart F. This program shall include, without limitation, location, number and depth of wells, sampling and analytical methods, evaluation procedures, schedule of implementation, and provisions for determination of concentrations, rate, and extent of migration of hazardous wastes and constituents. A copy of this program shall be sent to U.S. EPA, Region V, Michigan/ Wisconsin Technical Enforcement Section, RCRA Enforcement Section, 2305 Dearborn Street, 5HR-12, Chicago, Illinois 60604. Defendants thereafter shall implement the new groundwater monitoring program approved by MDNR.

6. This Order Of Permanent Injunction shall be binding upon Defendant PPP, Michael J. Ladney, and MCP, and upon their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them, who receive actual notice of this Order by personal service or otherwise.

/s/ Benjamin F. Gibson
Benjamin F. Gibson
United States District Court Judge

No. 91-1728

UNITED STATES COURT OF APPEAL

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, AND FRANK J. KELLY, Attorney General for the State of Michigan ex rel. MICHIGAN NATURAL RESOURCES COMMISSION, and GORDON E. GUYER, Director of the Michigan Department of Natural Resources,

Plaintiffs-Appellees,

v.

PRODUCTION PLATED PLASTICS, INC., MICHIGAN CITY PLASTIC CO., INC., MICHAEL J. LADNEY, JR.;

Defendants-Appellants.

_____/

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

(Filed Feb. 20, 1992)

BEFORE: MARTIN and MILBURN, Circuit Judges; and CONTIE, Senior Circuit Judge.

PER CURIAM. Production Plated Plastics, Inc., Michael Ladney and Michigan City Plastics appeal the district court's grant of summary judgment to the United States. We need not repeat the facts of this case as they have been outlined in *United States v. Production Plated Plastics, Inc.*, 742 F. Supp. 956, 960-91 (W.D. Mich. 1990). In granting summary judgment, the district court found

Production and Production's president, Michael Ladney liable for violations of the Resource Conservation and Recovery Act and the Michigan Hazardous Waste Management Act. The district court found as a matter of law, Production lost its interim status to operate a hazardous waste facility on November 8, 1985 and continued its hazardous waste activities after that loss.

In a separate opinion, the district court granted partial summary judgment to the United States in the form of a permanent injunction against Production, Michael Ladney, and Production's parent corporation, Michigan City Plastics. The permanent injunction requires Production, Ladney, and Michigan City Plastics to implement and complete a state-approved closure plan as mandated by RCRA and Michigan's hazardous waste act. The district court incorporated the approved plan into the injunctive order and included a time schedule for completion of the various parts of the plan. The court ordered that if Production was unable to comply with the closure plans, Production must fully comply with post-closure maintenance requirements as stated in 42 U.S.C. § 265. The court also ordered Production to implement a new groundwater monitoring system approved by Michigan's Department Natural Resources.

We have reviewed the record and find that the district court properly applied the standards for injunctive relief. By not closing the Richland facility in November 1985, Production was in direct conflict with RCRA. The continued use of the facility after November 1985, and the failure to implement the state-approved closure plans imposes a continuing health hazard and thwarts the express purpose of RCRA. Production argues that it is

impossible for Production to comply with the district court's injunction. Other courts have effectively rejected impossibility as a viable defense. *See United States v. T & S Brass and Bronze Works, Inc.*, 681 F.Supp 314, 321 (D. S.C.), *aff'd*, 865 F.2d 1261 (4th Cir. 1988).

Production and Ladney are the only parties who can bring about closure of the facility in keeping with RCRA's mandate. The purposes and intent of RCRA in its application to the Richland facility will be achieved only through the implementation of the approved closure plan. The district court has correctly and appropriately insured the implementation of the closure plan by finding Production, Michigan City Plastics and Michael Ladney liable for violations of RCRA and Michigan's hazardous waste act and through the imposition of an injunctive order.

We adopt the opinions of the district court and the findings contained therein.

A TRUE COPY

Attest:

LEONARD GREEN, Clerk

By /s/ Sharon R. Tallango
Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
FRANK J. KELLY, Attorney General
for the State of Michigan, ex rel.,
MICHIGAN NATURAL RESOURCES
COMMISSION, and GORDON E. GUYER,
Director of the Michigan Department
of Natural Resources,

Plaintiffs,

vs.

File No. K87-138-CZ
HON. BENJAMIN F. GIBSON

PRODUCTION PLATED
PLASTICS, INC.,
and MICHAEL J. LADNEY, JR.,

Defendants.

DEPOSITION OF:

STEVEN D. NOBLE

January 30, 1989
621 North 10th Street
Plainwell, Michigan

Appearances – MARK S. MEADOWS, P-24101
and
WILLIAM MERRILL, ESQ.
Attorneys for Plaintiffs

DOUGLAS W. VAN ESSEN, P-33169
Attorney for Defendants

Recorded By – NETWORK REPORTING CORPORATION
Sandra L. Corsiglia, CER-3454

* * *

[p. 53] Q You don't know who the corporate officers are? Do you know any of the corporate officers?

A A few of them, yes, that I have had contact with.

Q Who are the ones you've had contact with?

A I have contact with Mr. Breen, the corporate counsel, and Mr. Krockta, who is corporate safety and environmental, and that's about the extent of it.

Q Is Mr. Ladney a corporate officer?

A Yes, he is.

Q Have you even had contact – have you ever had any discussions with him?

A No, I have not.

Q Who hired you?

A Mr. Evans hired me.

Q In your discussions about the – either the layouts or the shutdown of the plant with Mr. Evans, did he ever mention discussing either of those matters with Mr. Ladney?

A He's in contact daily with Mr. Ladney, from what I understand.

* * *

[p. 57] Q You made a statement that you understood Mr. Evans to be in contact daily with Mr. Ladney. How do you know that?

A He receives phone calls from him.

Q How do you know that?

A Because he's said that he's talked to Mr. Ladney or –

Q He tells you that he talks to Mr. Ladney daily?

A Yeah. I – well, not daily, but he receives phone calls. You know, I –

Q You've been present when he's received phone calls from Mr. Ladney?

A Yeah.

Q Have you been present when he calls Mr. Ladney?

A No, I have not.

Q Do you know, when you refer to Mr. Ladney, do you mean Michael Ladney or Nicholas Ladney?

A Michael Ladney.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, FRANK J. KELLY, Attorney General for the State of Michigan, ex rel., MICHIGAN NATURAL RESOURCES COMMISSION, and GORDON E. GUYER, Director of the Michigan Department of Natural Resources,

Plaintiffs,

vs.

PRODUCTION PLATED PLASTICS, INC., and MICHAEL J. LADNEY, JR.,

Defendants.

FILE NUMBER:
K87-138-CZ
HON. BENJAMIN F. GIBSON

DEPOSITION OF:

JAMES M. BREITENBACH

February 1, 1989
621 North 10th Street
Plainwell, Michigan

Appearances – MARK S. MEADOWS, P-24101
and
WILLIAM MERRILL, ESQ.
Attorneys for Plaintiffs

DOUGLAS W. VanESSEN, P-33169
Attorney for Defendants

Recorded By – NETWORK REPORTING CORPORATION
Sandra L. Corsiglia, CER-3454

* * *

[p. 6] Q All right. And from August of '85, when you hired on at PPP, until the time you left in June of '88, did you hold the same position during that time period at PPP?

A Yeah.

Q And what was your title?

A Environmental specialist.

Q And what were your duties?

A Well, mainly to make sure the company was in compliance with the environmental regulations as far as I could go, and to actually do the work to keep the company in compliance, revamp the contingency plans. The biggest priority when I first came on was to write the closure plans and carry those out, I guess. And the groundwater monitoring was my responsibility, and miscellaneous sorts of things dealing with the air quality from the paint booths and public health.

Q How about the lagoons at the plant? Did you have any control over those lagoons, or responsibility relating to them?

A Well, I felt I had an input on the handling of material there.

* * *

[p. 12] Q Obviously, if Charles Gilchrist is dead, you didn't consult with him. Who did you then report to after he died?

A Bill Evans.

Q And did you have any discussions with him relating to the closure plans?

A Oh, yeah. The closure plans were a group effect. Everybody had their input as to –

Q Okay. Tell me who else had input besides yourself and Mr. Evans.

A Well, just to bend other people's ear. I talked to John Wuori, who was an industry engineer at the time. And, to some extent, Mike Smith was also involved, as far as any [p. 13] treatment of waters.

* * *

[p. 52] Q When you talked about some of the recommendations you made, you said something about, well, you didn't have the final say. Who did have the final say with respect to environmental matters?

A Bill Evans on certain issues, I'm sure.

* * *